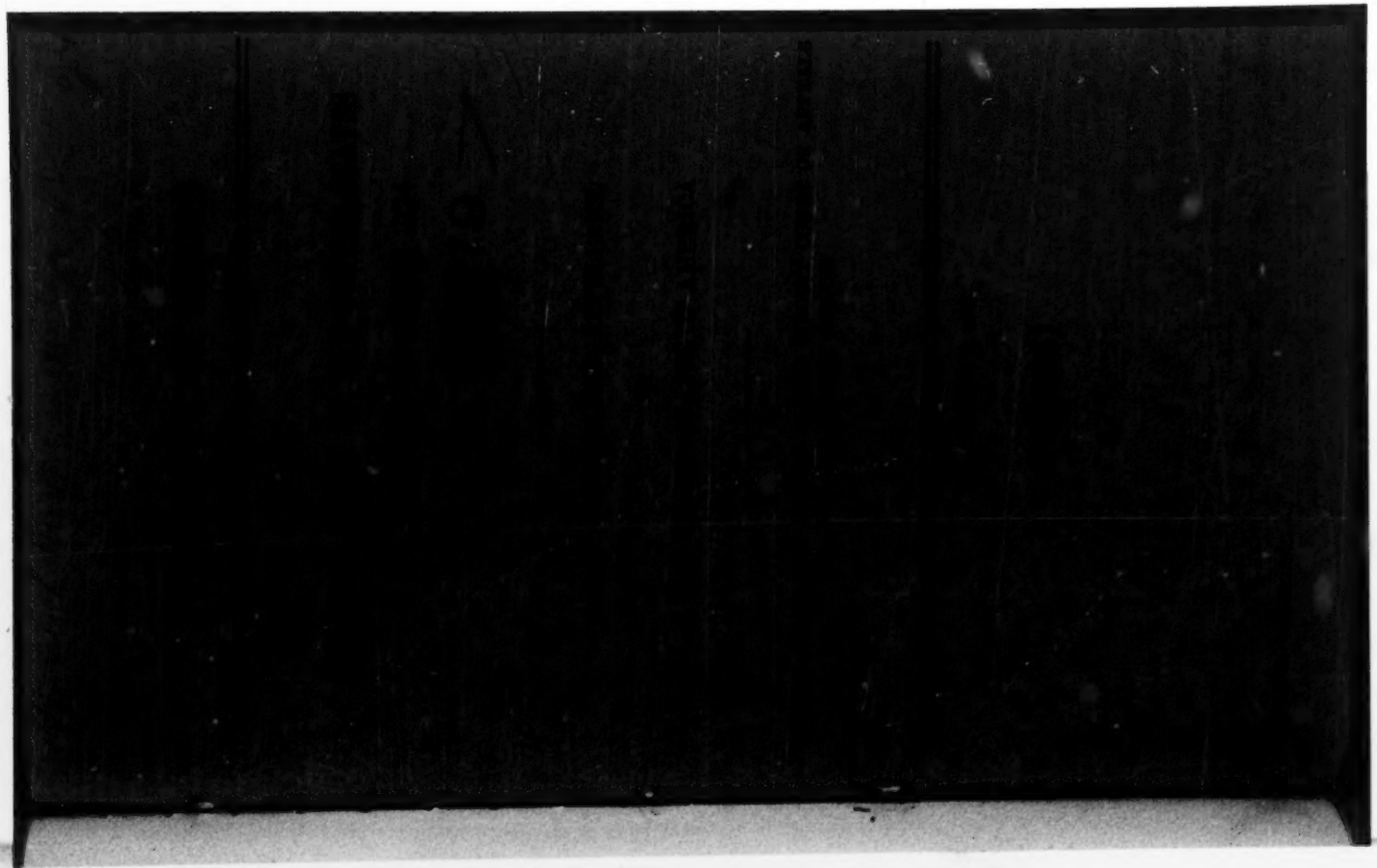


(29,665)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 355

J. W. SUNDERLAND, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1923

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1922, of said Court, before the Honorable Kimbrough Stone, Circuit Judge, and the Honorable Jacob Trieber and the Honorable Tillman D. Johnson, District Judges.

Attest: E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

Be it Remembered that heretofore, to-wit: on the 26th day of June, A. D. 1922, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals, in a certain cause wherein J. W. Sunderland was Appellant and the United States of America was Appellee, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE R. L. WILLIAMS, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

UNITED STATES OF AMERICA, PLAINTIFF,

In Equity *vs.* No. 2567

J. W. SUNDERLAND AND FANNIE PERRYMAN, DEFENDANTS.

J. W. SUNDERLAND, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

In the United States District Court for the Eastern District of Oklahoma. United States of America, Plaintiff, v. J. W. Sunderland and Fannie Perryman, Defendants.—No. 2567 E.

Bill of Complaint.

United States of America, by its undersigned solicitors, acting by and under direction of the Attorney General of the United States, and at the request of the Secretary of the Interior, brings this its bill of complaint against J. W. Sunderland and Fannie Perryman, citizens of the Eastern District of Oklahoma, and for cause of action plaintiff says:

I.

That Nathaniel Perryman is a half-blood citizen of the Creek Nation of Indians and is enrolled as such opposite No. 2220 of the approved rolls of citizens by blood of that Nation; and that, as such citizen, there was allotted and patented

to him certain lands designated as his homestead allotment, a description of which is not here material; that, pursuant to and under the rules and regulations prescribed by the Secretary of the Interior, said homestead allotment was sold for and on behalf of the said Nathaniel Perryman by the Secretary of the Interior, the proceeds of said sale being retained by the Secretary of the Interior to be disbursed under his orders for the benefit of said allottee. Plaintiff alleges that, with a portion of the funds thus derived, there was purchased for and on behalf of the said Nathaniel Perryman the following described real estate, to-wit: The Southeast quarter of Section eight (8), Township sixteen (16) North, Range thirteen (13) East, located in Tulsa County, Eastern District of the State of Oklahoma; that said land was purchased from Grant R. McCullough and Clara E. McCullough, his wife, and Lawrence K. Cone and Kate P. Cone, his wife, who conveyed the same to said Nathaniel Perryman by warranty deed of date June 24, 1918, a photostat copy of which deed is hereto attached, marked Exhibit "A" and made a part hereof. Said deed appears of record in book 250, page 92, of the records of Tulsa County, Oklahoma. That, pursuant to the rules and regulations of the Secretary of the Interior, there was incorporated in the habendum clause of said deed a restriction against alienation by virtue of which any lease, deed, mortgage, power of attorney, contract to sell or other instrument affecting the land therein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, unless made with the consent of and approved by the Secretary of the Interior, shall not be of any force and effect or capable of confirmation or ratification.

II.

Plaintiff alleges that the land so purchased, described in Paragraph No. 1, is reserved by law from alienation and encumbrance and has not been at any time since June 24, 1918, and is not now, subject to alienation or encumbrance by the allottee or any other person.

III.

That, notwithstanding the restricted character of said land as hereinabove recited, there was on July 15, 1918, filed for record in the office of the County Clerk of Tulsa County, Oklahoma, a certain instrument in writing, dated July 15, 1918, executed by Nathan Perryman, the allottee aforesaid, together with his wife, Fannie Perryman, purporting to be a rental contract conveying to the defendant, J. W. Sunderland, a leasehold estate for agricultural purposes for a period of five years, beginning January 1, 1919, in and to the land de-

scribed in Paragraph 1, less five acres in the Northeast corner of the Southeast quarter of the Southeast quarter of the Southeast quarter of said Section eight (8), Township sixteen (16) North, Range Thirteen (13) East, which rent contract appears of record in book 242, page 374, of the records of Tulsa County, Oklahoma, a true copy of which is hereto attached, marked Exhibit "B" and made a part hereof.

IV.

That, on November 6, 1918, there was recorded in the office of the County Clerk of Tulsa County, Oklahoma, in book 254, at page 65, a certain instrument in writing, dated November 4, 1918, executed by Nathan Perryman and J. W. Sunderland, purporting to be a rental contract conveying to said J. W. Sunderland a leasehold estate for a period of five years from January 1, 1919, in and to all of that portion of said Southeast quarter of Section eight (8) Township sixteen (16) North, Range thirteen (13) East, not covered by the rent contract described in Paragraph 3 hereof. A true copy of said rent contract marked Exhibit "C" is hereto attached and made a part hereof.

V.

That, on December 2, 1918, there was recorded in the office of the County Clerk of Tulsa County, Oklahoma, in book 264, at page 333, a certain instrument in writing, dated November 30, 1918, executed by Nathan Perryman and Fannie Perryman, purporting to be a warranty deed conveying to the defendant, J. W. Sunderland, the land described in Paragraph 1 hereof, a true copy of which deed marked Exhibit "D" is hereto attached and made a part hereof.

VI.

That, on February 20, 1919, there was filed for record in the office of the County Clerk of Tulsa County, Oklahoma, a certain instrument in writing, dated February 20, 1919, executed by Nathaniel Perryman, purporting to be a warranty deed conveying to the defendant, Fannie Perryman, the following portion of the above described land, to-wit: The North half of the Southeast quarter of Section eight (8), Township sixteen (16) North, Range thirteen (13) East. Plaintiff is not advised as to the book and page in which said deed is recorded, but a true copy thereof, marked Exhibit "E," is hereto attached and made a part hereof.

VII.

Plaintiff alleges that the Nathan Perryman and the Nathaniel Perryman mentioned and referred to in this bill and in the exhibits thereto is one and the same person.

Plaintiff is without further knowledge of the claim or claims of defendants or either of them to the lands described in Paragraph 1 and calls upon them and each of them to disclose the same, if any they have.

Wherefore plaintiff prays:

1. That subpoena be issued to each of the defendants, requiring them and each of them to answer this bill of complaint within a time to be specified.

2. That the allottee and grantee, Nathaniel Perryman, be decreed to be the owner in fee of the lands described in Paragraph 1, and that the defendants and each of them be decreed to have no right, title or interest in or to said lands or any part thereof.

3. That the instruments in writing heretofore described as Exhibits "B," "C," "D" and "E," and each of them, be declared null and void, and that they be cancelled of record.

4. That the defendants and each of them and all persons claiming by, through or under them be decreed to be without right, title or interest in and to the lands hereinbefore described, and be enjoined from asserting any right, title or interest therein or in any manner interfering with the use and possession of the said lands by said Nathaniel Perryman.

5. That the plaintiff have all such other and further relief to which it may be entitled in equity and good conscience.

W. P. McGINNIS,
United States Attorney.
L. K. POUNDERS,
Special Assistant United States Attorney.

EXHIBIT A.

Received Office of Field Clerk Five Civilized Tribes Aug 16 1918 Sapulpa, Oklahoma.

Received Aug 17 1918 Encl. to No. 67811 Sup Five Civilized Tribes.

Office of Indian Affairs Received Mar 11 1919 21514 268

Warranty Deed—Special Form.

This Indenture, made, executed and delivered this 24th day of June, 1918, by and between Grant R. McCullough and Clara E., his wife, and Lawrence K. Cone and Kate P. Cone. his wife, parties of the first part, grantors, and Nathaniel Perryman, party of the second part, grantee, witnesseth:

That for and in consideration of the sum of Nine Thousand Six Hundred and no/100 Dollars ($9,600.00), to .... in hand paid, the receipt whereof is hereby acknowledged, from

Nathaniel Perryman, the same being funds held by the United States in trust, subject to disbursement under the supervision of the Secretary of the Interior, derived from the sale of restricted land have granted, bargained, sold and conveyed unto the said Nathaniel Perryman grantee, and by these presents do hereby grant, bargain, sell and convey unto the said Nathaniel Perryman, grantee, the following described real property and premises situated in Tulsa County, State of Oklahoma, to-wit:

> The South East Quarter (SE¼) of Section Eight (8) Township Sixteen (16) North, Range Thirteen (13) East, containing One Hundred and Sixty (160) acres more or less according to government survey except oil and gas lease (revenue stamps)

together with all the improvements thereon, and appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises, unto the said grantee, his heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931. shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior.

Signed and delivered on the day and date first above mentioned.

GRANT R. McCULLOUGH,
CLARA E. McCULLOUGH,
LAWRENCE K. CONE,
KATE P. CONE.

Witnesses:

Acknowledgment.

The State of Oklahoma, Tulsa County—ss.

Before me, M. Hansel, a Notary Public, in and for said County and State, on this 24th day of June, 1918, personally appeared Grant R. McCullough and Clara E. McCullough, his wife; Lawrence K. Cone and Kate P. Cone, his wife, to me known to be the identical persons who executed the within and foregoing instrument, in my presence and both of said grantors acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal, the day and year above

set forth. M. Hansel, Notary Public. My commission expires Sept. 10th, 1921. (Seal)

Certificate of Notice.

Department of the Interior. United States Indian Service, Five Civilized Tribes, Muskogee, Oklahoma. June 24, 1918.

I hereby certify that the land described in the above deed was purchased for the said Nathaniel Perryman with funds held in trust by the United States for his benefit derived from the sale of land allotted to him by virtue of his enrollment as a ½ blood citizen of the Creek Nation, opposite No. 2220 on the final approved rolls of citizens by blood of that Nation, and that said purchase was made and said deed was executed, and the same is hereby approved pursuant to the Act of Congress of May 27, 1908, which authorized the Secretary of the Interior to remove restrictions from lands of the Five Civilized Tribes, "Wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

JOE. H. STRAIN,
Acting Superintendent for the
Five Civilized Tribes.

115674 Compared Warranty Deed Special Form. Grant R. McCullough, et al., to Nathaniel Perryman 1.25. State of Oklahoma, Tulsa County, Tulsa, Okla. I hereby certify that this instrument was filed for record in my office at 11 o'clock A. M. on Jul 6 1918 and duly recorded in Record 250, page 92. Lewis Cline, County Clerk, O. G. Weaver, Deputy. When recorded return to Eldon Lowe at Sapulpa, Okla. 8-16-13.

EXHIBIT "B."

Rental Contract.

This agreement, made and entered into this 15th day of July, 1918, by and between Nathan Perryman and Fannie Perryman, his wife, parties of the first part, and J. W. Sunderland, party of the second part.

Witnesseth: That in consideration of the covenants and agreements hereinafter made, the parties of the first part have let and leased and do by these presents let and lease unto the party of the second part, for agriculture purposes, for a period of five years from the 1st day of January, 1919, all the following described lands, situated in Tulsa County, State of Oklahoma, to-wit:

The Southeast Quarter of Section 8, Township 16 North,

Range 13 East, except five acres in the Northeast Corner of the Southeast Quarter of the Southeast Quarter of the Southeast Quarter, the land hereby leased containing 95 acres, more or less.

The said party of the second part, for the use of said land and in full payment for the rental thereof hereby agrees to pay to the parties of the first part the sum of Seven Hundred Dollars ($700.00) to be paid as follows, to-wit: Six Hundred Dollars ($600.00) on the execution and delivery of this contract, the receipt whereof is hereby acknowledged by the parties of the first part and One Hundred Dollars ($100.00) on or before the 1st day of January, 1919.

The party of the second part is to build a fence between the land hereby leased and the land reserved in the

Southwest Quarter of the Southeast Quarter,

and each of the parties hereto are to have access to the pond on said premises and the uses of the water thereon as long as the said pond supplies water.

It is expressly agreed and understood between the parties hereto that all improvements now on said land are at the expiration of this lease to revert to the parties of the first part with the land. Party of the second part to have the right to remove all buildings he may place thereon.

It is further agreed that the party of the second part will not commit waste or permit waste to be committed on said premises, and that he will keep all fences on said premises in good repair.

It is further agreed that the party of the second part shall succeed to all the rights of the parties of the first part in and to the uses of gas produced on the premises hereby leased.

The party of the second part further agrees that at the expiration of this lease he will surrender the same to the parties of the first part in as good condition as the same now are, natural wear and tear, except.

In witness whereof, the parties have hereunto subscribed their names this the 15th day of July, 1918.

(Signed) NATHAN PERRYMAN,
FANNIE PERRYMAN,
Parties of the First Part.
J. W. SUNDERLAND,
Party of the Second Part.

State of Oklahoma, Tulsa County. ss.

Before me, the undersigned, a notary public in and for

Tulsa County, State of Oklahoma, on this 15th day of July, 1918, personally appeared Nathan Perryman and his wife, Fannie Perryman, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth. (Signed) C. P. Monroy. Notary Public. (Seal). My Commission expires October 16, 1920.

Filed for record in Tulsa County, Oklahoma, July 15, 1918, at 10:20 o'clock, A. M. (Signed) Lewis Cline County Clerk. By O. G. Weaver deputy.

EXHIBIT "C"

Rental Contract.

This agreement, made and entered into this the 4th day of November, 1918, by and between Nathan Perryman and Fannie Perryman, his wife, parties of the first part, and J. W. Sunderland, party of the second part.

Witnesseth: That in consideration of the covenants and agreements hereinafter made, said parties of the first part have let and leased, and by these presents do let and lease unto the party of the second part for agriculture purposes, for the period of five years from the 1st day of January, 1919, all the following described land situated in Tulsa County, State of Oklahoma, to-wit:

> All that portion of the Southeast Quarter of Section 8, Township, 16 North, Range 13 East, not covered by a certain lease

executed by the parties of the first part to the party of the second part on the 15th day of July, 1918, and recorded in book 242 on page 374, in the office of the county clerk of Tulsa County, State of Oklahoma, it being the intention of the parties of the first part to make this and said former lease cover the entire southeast Quarter above described.

The party of the second part for the use of said land and in full payment for the rental of the portion herein leased agrees to pay to the parties of the first part as follows: $75.00 on the execution and delivery of this contract, a receipt is hereby acknowledged by the parties of the first part; $100.00 on or before the 1st day of January, 1920; and $100.00 on the 1st day of January of each suceeding year until the full balance of $400.00 is paid.

The party of the second part is to keep up all fences and improvements at his own expense.

It is expressly agreed and understood by and between the parties hereto, that all improvements now on said land are at the expiration of this lease, to revert to the parties of the first part with the land. The party of the second part to have the right to remove all buildings he may place thereon and to remove the same during the pendency of this lease or within thirty days after its expiration.

It is further agreed that the party of the second part will not commit any waste or permit any waste to be committed.

It is further agreed that the party of the second part shall succeed to all rights of the parties of the first part and to the uses of gas which may be produced on said premises and that the entire interest of the said parties of the first part in all outstanding leases on said premises are hereby assigned to the party of the second part.

In witness whereof, the parties of the first part have hereunto signed their names this the 4th day of November, 1918.

(Signed) NATHAN PERRYMAN,
Parties of the first part.
J. W. SUNDERLAND.
Party of the second part.

State of Oklahoma, Tulsa County. ss.

Before me, the undersigned, a notary public, in and for Tulsa County, State of Oklahoma, on this 4th day of November, 1918, personally appeared Nathan Perryman, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth. (Signed) C. P. Monroy. Notary Public. (Seal.) My commission expires October, 16, 1920.

Filed for record in Tulsa County, Oklahoma, at 10:o'clock A. M. November 6, 1918. Lewis Cline County Clerk. By O. G. Weaver, Deputy. (Seal.)

EXHIBIT "D"

Warranty Deed.

This indenture, made this 30th day of November, A. D. 1918, between Nathan Perryman and Fannie Perryman, his wife, of Tulsa County, in the State of Oklahoma, parties of the first part, and J. W. Sunderland, party of the second part.

Witnesseth: That in consideration of the sum of $5000 the receipt whereof is hereby acknowledged by parties of the first part, do by these presents grant, bargain, sell and con

vey unto said party of the second part, his heirs and assigns all of the following described real estate situated in the County of Tulsa, State of Oklahoma, to-wit:

The Southeast Quarter of Section 8, Township 16 North, Range 13 East, containing 160 acres more or less.

To Have and To Hold the same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining forever.

The said Nathan Perryman and Fannie Perryman, their heirs, executors or administrators do hereby covenant, promise and agree to and with said party of the second part that at the delivery of these presents that they are lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted and described premises with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes and assessments and incumbrances of whatsoever nature and kind and that they will warrant and forever defend the same unto the said party of the second part his heirs and assigns against said parties of the first part their heirs and assigns and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands the day and year first above written.

(Signed) NATHAN PERRYMAN,
FANNIE PERRYMAN.

State of Oklahoma, Tulsa County. ss.

Before me, G. L. Holt, a Notary Public, in and for said County and State on this 30th day of November, 1918, personally apeared Nathan Perryman and Fannie Perryman to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above written. (Signed) G. L. Holt, Notary Public. (Seal) My commission expires November 22, 1921.

Filed for record this the 2nd day of December, 1918, at 10: o'clock, A. M. Lewis Cline, County Clerk. By O. G. Weaver, Deputy.

Filed May 2, 1919, R. P. Harrison. Clerk U. S. District Court.

(Disclaimer of Fannie Perryman.)

Comes now Fannie Perryman of Tulsa County, in the Eastern District of Oklahoma, and for her separate answer to the petition filed herein states that she disclaims any right, title or interest in and to the property in said petition described.

Wherefore she asks that she may be dismissed with her costs herein expended.

FANNIE PERRYMAN,
Defendant.

Witness: Jas. S. Watson.

Filed May 21, 1919. R. P. Harrison, Clerk U. S. District Court.

Amendment to Bill of Complaint.

Comes the United States of America, by its undersigned solicitors, and shows to the court that since the filing of the bill of complaint herein on May 2, 1919, plaintiff has learned that on April 28, 1919, a certain judgment, attempting to quiet title in J. W. Sunderland to the lands involved in this action, was entered by the Superior Court of Tulsa County, Oklahoma; wherefore, with permission of this court first had and obtained, plaintiff amends its bill of complaint by adding thereto paragraph

VI-a.

That on April 28, 1919, the Superior Court of Tulsa County, Oklahoma, entered a judgment in civil case No. 5919, styled J. W. Sunderland v. Nathaniel Perryman, et al., wherein and whereby said J. W. Sunderland was decreed to be the owner in fee of the lands in paragraph I of the bill herein described and attempt was made to quiet title thereto in said Sunderland, a true copy of which judgment and decree is hereto attached, marked Exhibit "F," and made a part hereof; that said judgment is void as against this plaintiff, for the reason that this plaintiff was not a party to that action, but that it constitutes a cloud upon the title of said Nathaniel Perryman and ought to be cancelled of record.

Plaintiff further amends the prayer of its bill of complaint by adding, in the second line of paragraph 3 thereof, after the letter "E," the letter "F."

W. P. McGINNIS,
United States Attorney,
L. K. POUNDERS,
Special Assistant United States Attorney,
Solicitors for Plaintiff.

(Exhibit F.)

In the Superior Court of Tulsa County, State of Oklahoma. J. W. Sunderland, Plaintiff, vs. Nathaniel Perryman, Grant R. McCullough and Lawrence K. Cone, Defendants. No. 5919.

Journal Entry.

Be it remembered that on the 28th day of April, the above entitled matter comes on regularly to be heard to the court at a time when the same is in regular judicial session, and thereupon said plaintiff appears in person, and by J. M. Springer, his attorney, and the defendants appear not, either in person or by attorney, and thereupon the plaintiff moves for a default against them, which is granted, after being three times loudly called, and still fail to appear. And thereupon the plaintiff introduces his evidence and rests, and the court, after examining the pleadings and proceedings herein and being fully advised in the premises, finds:

That each and all of said defendants have been duly and legally served by personal service and summons herein, and have made appearances herein; that the defendant herein has filed his disclamer, disclaiming any interest in this matter adverse to the rights of said plaintiff, and the defendants, Grant R. McCullough and Lawrence K. Cone, have filed herein their demurrer, which was duly overruled on the 22nd day of March, 1919, and said defendants having failed and neglected and refused to plead further and the time within which to do so having expired, they are adjudged to be in default herein.

And the court further finds that the said Nathaniel Perryman on the 21st day of March, 1919, was allowed to withdraw his answer herein, wherein he disclaimed any interest in this cause and was granted thirty days from said date a date within which to further plead, and having failed, neglected and refused to do so, is adjudged to be in default herein.

And the court further finds that the true name of the defendant Perryman is Nathan Perryman and that Nathan Perryman and Nathaniel Perryman are one and the same person, and that the plaintiff derives his title from him as signing the deed Nathan Perryman.

And the court further finds from the evidence that the allegations are true; that he is the owner entitled to the possession of the following described real estate, located in Tulsa County, State of Oklahoma, to-wit:

Southeast quarter of Section 8, Township 16 North, Range 13 East;

And that his title to said premises shall be declared and perfected in said plaintiff.

It is, therefore, by the court considered, ordered and adjudged, that the title to the said premises be, and it is hereby quieted in said plaintiff and said defendants and each of them are hereby estopped and denied the right, title or any interest in or to the said premises adverse to the rights, title and interest of said plaintiff. It is further the judgment and order of this court that Nathan and Nathaniel Perryman are one and the same person and that he did estop and deny the right to any claim or interest into said lands as by reason of having signed the deed as Nathan Perryman, whereas he should have signed same as Nathaniel Perryman, and that the plaintiff have judgment for costs herein taxed at $.....

L. J. MARTIN, Judge.

Endorsements: J. W. Sunderland vs. Nathaniel Perryman. Journal entry of judgment. Superior Court, State of Oklahoma, County of Tulsa. Filed April 28, 1919. John D. Porter, Court Clerk. J. M. Springer, attorney for plaintiff. Entered in journal No. 6, page No. .....

Filed May 22, 1919. R. P. Harrison, Clerk U. S. District Court.

Separate Motion of J. W. Sunderland to Dismiss.

This defendant, not confessing or acknowledging all or any of the matters or things in the bill of complaint contained to be true in the manner and form as therein alleged, moves the court to dismiss said bill of complaint, and for causes for such dismissal shows:

First. It appears by plaintiff's own showing by said bill of complaint that the plaintiff has no legal capacity to commence or maintain the cause of action set forth in its said bill of complaint.

Second. It appears by the plaintiff's own showing by the said bill of complaint that said plaintiff is not entitled to the relief prayed in said bill of complaint nor to any relief against this defendant.

Third. It appears from the showing of the plaintiff and by its said bill of complaint that the complainant is not the real party in interest, and fails to state facts sufficient to authorize it to bring or maintain this action.

Wherefore, and for divers other good causes appearing on said bill the defendant moves the court to dismiss said bill of complaint, and he prays judgment of this honorable court whether he shall be compelled to make any answer to

said bill, and that he be hence dismissed with his reasonable costs in this behalf sustained.

J. M. SPRINGER &
E. G. WILSON,
Solicitors and of Counsel for Defendant.
J. W. Sunderland.

I hereby certify that the foregoing motion, in my opinion. is well founded in point of law.

J. M. SPRINGER,
E. G. WILSON,
Of Counsel for Defendant, J. W. Sunderland.

State of Oklahoma, Tulsa County, ss.

J. W. Sunderland being first duly sworn according to law says that he is one of the defendants in the above entitled cause, and that the foregoing motion is true in point of fact and is not interposed for delay.

J. W. SUNDERLAND.

Subscribed and sworn to before me this the 4th day of June, 1919. Font L. Allen, Notary Public. (Seal) My com. expires 2/24/1923.

Filed June 7, 1919. R. P. Harrison, Clerk U. S. District Court.

Order Overruling Motion to Dismiss.

Now on this 1st day of November, 1919, this cause coming on to be heard, and the court being sufficiently advised in the matter,

It is ordered that the motion to dismiss be and the same is hereby overruled, to which action of the court the defendants each separately excepted and still excepts, the defendant is required by rule to answer within twenty days.

R. L. WILLIAMS, Judge.

Filed Nov. 1, 1919. R. P. Harrison, Clerk. U. S. District Court.

Separate Answer of J. W. Sunderland.

Comes now the defendant J. W. Sunderland and for his answer to the bill of complaint of the plaintiff filed herein says that he denies each and every material allegation therein contained except as hereinafter specifically admitted and he specifically denies that pursuant to and under the rules and regulations of the Secretary of the Interior the homestead allot-

ment of Nathan Perryman was sold by the Secretary of the Interior but alleges as a matter of fact that only a portion thereof was sold and that the remainder thereof is still the homestead of the said Nathan Perryman and is occupied by him as such and is of the value of $20,000.00 and that the defendant is not sufficiently informed to either admit or deny the allegation in said bill of complaint that the proceeds or any portion thereof of the sale of any portion of said homestead was invested on behalf of said Nathaniel Perryman in the land described in the plaintiff's bill of complaint, and therefore asks that proof be made as to such allegation.

The defendant further specifically denies that there was incorporated in the habendum clause of the deed from Grant R. McCullough and Clara McCullough, his wife, and Lawrence K. Cone and Kate P. Cone, his wife, a restriction against the alienation of the land described in said deed pursuant to any rules or regulations of the Secretary of the Interior and denies that any restrictions therein contained was authorized by such rules and regulations and denies that the Secretary of the Interior had any authority to incorporate in said deed any restriction against the alienation of said real estate.

This defendant further specifically denies that the said land so described in paragraph 1 of plaintiff's bill of complaint is reserved by law from alienation and encumbrance, but on the contrary states that said lands was not at the time said deed was executed nor at any time since then subject to any restriction upon the alienation or encumbrance by the allottee or any other person.

Second. This defendant admits that Nathaniel Perryman is a half-blood citizen of the Creek Nation of Indians and is enrolled as such opposite No. 2220 of the approved rolls of citizens by blood of the Creek Nation and that there was allotted to him as such citizen a homestead allotment.

The defendant further admits that Grant R. McCullough and Clara E. McCullough, his wife, and Lawrence K. Cone and Kate P. Cone, his wife, conveyed the land described in paragraph 1 of plaintiff's bill of complaint to Nathaniel Perryman by warranty deed on the 24th day of June, 1918, and that the copy attached to the plaintiff's bill of complaint and marked Exhibit A is a true and correct copy of said deed and that said deed is recorded as alleged in the plaintiff's bill of complaint and that there was recorded on November the 6th, 1918, in the office of the county clerk of Tulsa County, Oklahoma in book 254 at page 65, a certain instrument in writing dated November 4th, 1918, executed by Nathan Perryman to J. W. Sunderland, being a rental contract conveying to J. W. Sunderland a leasehold estate for a period of 5 years from January the

1st, 1919, to and all of that portion of the said SE¼ of Sec. 8, T. 16 N. of R. 13 E., not covered by the rental contract described in paragraph 3 of said bill of complaint and that a true copy of said lease it attached to plaintiff's petition and marked Exhibit C, and that on December the 2nd, 1918, there was recorded in the office of the county clerk of Tulsa County, Oklahoma, book 264 at page 333, a certain instrument in writing dated November the 30th, 1918, executed by Nathan Perryman and Fannie Perryman, being a warranty deed conveying to the defendants J. W. Sunderland the land described in paragraph 1 of the plaintiff's bill of complaint, a true copy of which is attached to said bill of complaint as Exhibit B.

The defendant further says that he has not sufficient information or knowledge that Nathaniel Perryman executed to the defendant Fannie Perryman the deed mentioned in paragraph 6 of the plaintiff's bill of complaint and therefore neither admits nor denies the same, but demands proof thereon.

The defendant further admits that Nathan Perryman and the Nathaniel Perryman mentioned in the bill of complaint and the exhibit thereto attached are one and the same person.

Third. The defendant further alleges and states that heretofore, to-wit, on December the 30th, 1918, the defendant J. W. Sunderland commenced his action against Nathaniel Perryman, Grant R. McCullough and Lawrence K. Cone by petition, a copy of which is hereto attached and made a part hereof and marked "Exhibit A." And pursuant to praecipe filed therein at the time all of the defendants therein, including Nathaniel Perryman, were duly and personally served with process of summons pursuant to which said defendants entered their full appearence to said cause in due time and the defendant Nathan Perryman filed his separate answer therein on the 20th day of January, 1919, a copy of said answer is hereto attached and made a part hereof and marked "Exhibit B," but afterwards, to-wit, on the 29th day of January, 1919, the defendants Grant R. McCullough and Lawrence K. Cone filed their demurrer to the petition of the plaintiff, a copy of which demurrer is hereto attached and made a part thereof and marked "Exhibit C." That afterwards, to-wit, on the 11th day of March, 1919, said demurrer was by the court overruled, a copy of the journal entry and order overruling said demurrer is hereto attached and made a part hereof and marked "Exhibit D."

That on the 21st day of March, 1919, the plaintiff, the United States of America, entered its appearance in said cause by James S. Watson, United States probate attorney who was then and there fully authorized by the plaintiff to enter the appearance of the plaintiff therein and to act for and

on behalf of the plaintiff therein and in open court presented an oral application to permit said Nathaniel Perryman to withdraw his answer in said cause, which application was then and there granted and the plaintiff at its request made in open court was then and there by the order of the court granted 30 days from that date in which to further plead in said action. A copy of said journal entry and order is hereto attached and made a part hereof and marked "Exhibit E."

This defendant further says that neither this plaintiff Nathaniel Perryman nor the other defendants made any further appearance in said cause and that afterwards, to-wit, on the 28th day of April, 1919, the said Superior Court of Tulsa County, State of Oklahoma, then and there having full and complete jurisdiction of both the subject-matter and the parties to said cause, said cause came regularly on for trial. Whereupon judgment was rendered in favor of the plaintiff therein J. W. Sunderland the defendant herein, adjudging that the title to said premises, to-wit, the SE¼ of Sec. 8, T. 16 N. of R. 13 E., was in the plaintiff therein and that the defendants and each of them were thereby estopped and denied the right to assert or claim any title or interest in or to said premises adverse to the rights, title and interest of the plaintiff. A copy of said judgment, with all the endorsements thereon, is hereto attached and made a part hereof and marked "Exhibit F."

Wherefore, this defendant prays that the plaintiff take nothing by its action herein and that the defendant [ ] a judgment for costs and all other proper relief in equity or at law.

J. M. SPRINGER,
E. G. WILSON,
Attorneys for Defendant, J. W. Sunderland.

State of Oklahoma, Tusla County, ss.

J. W. Sunderland being first duly sworn on his oath says that he is the defendant in the above entitled cause and that he has read and knows the contents of the above and foregoing answer and that the statements therein contained are true.

J. W. SUNDERLAND.

Subscribed and sworn to before me this the 15th day of November, 1919. Marie E. Wilson, Notary Public. (Seal) My commission expires Oct. 8, 1923.

"EXHIBIT A."

State of Oklahoma, Tulsa County, ss. In the Superior Court of said County. J. W. Sunderland, Plaintiff, vs. Nathaniel

Perryman, Grant R. McCullough and Lawrence K. Cone, Defendants.

Petition.

The plaintiff complains of the defendants and says, that the plaintiff is the owner in fee simple and in the actual and peaceable possession of the following described real estate situated in Tulsa County, State of Oklahoma, to-wit: The SE¼ of Sec. 8, Township 16 North, Range 13 East.

That the plaintiff derives his title to said premises as follows:

That said premises was allotted to Daniel Bigpond by the Muskogee (Creek), Nation on the 14th day of April, 1904, that said Daniel Bigpond died on the 29th day of April, 1907, leaving surviving him as his only heirs at law his widow, Nancy Bigpond, and his son Albert Bigpond, and his daughter Eliza Bigpond. That on the 15th day of December, 1908, the said Nancy Bigpond sold and conveyed her interest in and to said premises to H. U. Bartlett, who on the 14th day of February, 1911, sold and conveyed his interest to Grant R. McCullough and L. K. Cone. That on July 10th, 1909, the interests of the said Albert Bigpond and Eliza Bigpond, minors, was duly sold and conveyed by their guardian to Grant R. McCullough, and on the 24th day of June, 1918, the said Grant R. McCullough and wife and Lawrence K. Cone and wife sold and conveyed said real estate to the defendant Nathaniel Perryman, who on July 15th, 1918, sold and conveyed said premises to the plaintiff by warranty deed, a copy of which is hereto attached and made a part hereof and marked Exhibit A.

That the said defendants claim some estate right, title or interest in said estate by virtue of some conditions, restrictions or reservations in the deed from said Grant R. McCullough and Lawrence K. Cone to the defendant Nathaniel Perryman, and by virtue of the facts that the said deed from the defendant Perryman to the plaintiff is signed "Nathan Perryman" instead of "Nathaniel" Perryman; but the plaintiff alleges the fact to be that said defendant is called and commonly known as Nathan Perryman, and Nathaniel Perryman and Nathan Perryman are one and the same person, and the identical person to whom the said Lawrence K. Cone and wife and Grant R. McCullough and wife executed said deed, and the same identical person who executed the said deed to the plaintiff, and that said deed from Grant R. McCullough and wife and Lawrence K. Cone and wife contains no valid conditions, restrictions or reservations, and neither of said defendants have any right, title or interest in or to said premises; but the plaintiff alleges that the said claims of the said defendants

constitute a cloud upon the plaintiff's title in and to said premises.

Wherefore, the plaintiff prays that the defendants and each of them be required to set forth the nature of his claim, if any, to said premises, and that the plaintiff's claims and title to said premises be adjudged to be valid and perfect, and that the said defendants have no right, title or interest in or to said premises, and that the title of the plaintiff be quited in said premises, and that the defendants be perpetually barred and enjoined from setting up or asserting any right, title or interest in or to said premises adverse to the claim and title of the plaintiff, and for all other equitable and legal relief.

JAMES H. SYKES,
Attorney for the Plaintiff.

"EXHIBIT B."

State of Oklahoma, Tulsa County, ss. In the Superior Court of said County. J. W. Sunderland, Plaintiff, vs. Nathaniel Perryman, et al., Defendants.

Separate Answer of Defendant Nathaniel Perryman.

Comes now the defendant Nathaniel Perryman, and for answer to the petition filed by the plaintiff in the above entitled cause, says:

That he denies each and every material allegation therein contained, except as hereinafter specifically admitted.

This defendant admits that the [he] executed the deed mentioned in the plaintiff's petition and received the consideration therein named, and denies that he claims any right, title or interest in or to the real estate mentioned and described in said petition.

NATHAN PERRYMAN,
Defendant.

"EXHIBIT C."

State of Oklahoma, County of Tulsa, ss. In the Superior Court. *S.* W. Sunderland, Plaintiff, vs. Nathaniel Perryman, et al., Defendants, —No. 5919.

Demurrer of Defendants Grant R. McCullough and L. K. Cone.

Come now Grant R. McCullough and L. K. Cone, two of the defendants named in the above entitled and numbered cause, and demur to the petition of the plaintiff filed and exhibited herein and for grounds of objection, state:

That said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants.

GEORGE T. BROWN,
Attorney for Defendants Grant R. McCullough and L. K. Cone.

"EXHIBIT D."

State of Oklahoma, Tulsa County, ss. In the Superior Court of said County. J. W. Sunderland, Plaintiff, vs. Nathaniel Perryman, Grant R. McCullough and Lawrence K. Cone, Defendants, No. 5919.

Journal Entry.

And now on this the 11th day of March, 1919, this cause coming on for hearing on the demurrer of the defendants, Grant R. McCullough and Lawrence K. Cone, and the court having heard said demurrer and being fully and sufficiently advised in the premises overrules the same, and ask ten days within which to answer, which is allowed.

L. J. MARTIN, Judge.

O. K. Jas. H. Sykes, Att'y for plaintiff.

O. K. Geo. T. Brown, Attorney for defendants, Grant R. McCullough and L. K. Cone.

"EXHIBIT E."

State of Oklahoma, Tulsa County, ss. In the Superior Court Within and for said County and State. J. W. Sunderland, Plaintiff, vs. Nathaniel Perryman, Grant R. McCullough and Lawrence K. Cone, Defendants, —No. 5919.

Journal Entry of Order Allowing Defendant, Nathaniel Perryman, to Withdraw Answer and Extending Time for Defendants to Plead.

Now on this the 21st day of March, 1919, on oral motion of James S. Watson, United States probate attorney, appearing in his official capacity and as attorney for the said defendants and on good cause shown, and being fully advised in the premises.

It is, therefore, ordered, adjudged and decreed that the said defendant, Nathaniel Perryman, be, and he is hereby authorized to withdraw from the files his separate answer filed herein on the 20th day of January, 1919, and that he be allowed thirty days from this date in which to further plead herein.

It is further ordered, adjudged and decreed by the court that the defendants, Grant R. McCullough and Lawrence K. Cone, be and they are hereby allowed an extension of thirty days from this date within which to further plead in this cause.

Witness my hand and seal of this court this 21st day of March, 1919.

L. J. MARTIN,
Judge of the Superior Court of
Tulsa County, Oklahoma.

"EXHIBIT F."

In the Superior Court of Tulsa County, State of Oklahoma.
J. W. Sunderland, Plaintiff, vs. Nathaniel Perryman, Grant R. McCullough and Lawrence Cone, Defendants.

Journal Entry.

Be it remembered that on the 28th day of April, 1919, the above entitled matter comes on regularly to be heard to the court at a time when the same is in regular judicial session, and thereupon said plaintiff appears in person, and by J. M. Springer, his attorney, and the defendants appear not, either in person or by attorney, and thereupon the plaintiff moves for a default against them, which is granted, after being three times loudly called, and still failing to appear.

And thereupon the plaintiff introduces his evidence and rests, and the court, after examining the pleadings and proceedings herein and being fully advised in the premises, finds:

That each and all of said defendants have been duly and legally served by personal service of summons herein, and have made appearances herein; that the defendant, Nathaniel Perryman has filed herein his disclaimor, discharging any interest in this matter adverse to the rights of said plaintiff, and the defendants Grant R. McCullough and Lawrence Cone, have filed herein their demurrer, which was duly overruled on the 22nd day of March, 1919, and said defendants having failed, neglected and refused to plead further, and the time within which to do so having expired, they are adjudged to be in default herein. And the court further finds that said Nathaniel Perryman on the 21st day of March, 1919, was allowed to withdraw his answer herein, wherein he disclaimed any interest in this cause, and was granted thirty (30) days from said day and date within which to further plead, and having failed, neglected and refused to do so, is adjudged to be in default herein.

And the court further finds that the true name of the defendant Perryman is Nathaniel Perryman, and that Nathan and Nathaniel Perryman are one and the same person, and

that the plaintiff derives his title from him as signing the deed Nathan Perryman.

And the court further finds from the evidence that the allegations of the petition of the plaintiff are true; that he is the owner and entitled to the possession of the following described real estate, located in Tulsa County, Oklahoma, to-wit:

The Southeast Quarter (SE¼) of Section Eight (8), Township Sixteen (16) North of Range Thirteen (13);

And that his title to said premises should be declared and perfected in said plaintiff.

It is therefore, by the court, considered, ordered and adjudged, that the title to said premises be, and it is hereby quieted in said plaintiff, and said defendants and each of them are hereby estopped and denied the right, title or interest in or to said premises adverse to the rights, title and interest of said plaintiff. It is further the judgment and order of this court that Nathan and Nathaniel Perryman are one and the same person, and that he be estopped and denied the right to assert claim or interest in or to said lands by reason of having signed the deed as Nathan Perryman, whereas, he should have signed the same as Nathaniel Perryman, and that the plaintiff have judgment for costs herein taxed at $.....

L. J. MARTIN, Judge.

Filed Nov. 18, 1919. R. P. Harrison, Clerk U. S. District Court.

Decree.

Be it remembered that, on the 2nd day of January, 1922, the same being a day of the regular January, 1922, term of the aforesaid court, present and presiding Honorable R. L. Williams, judge thereof, the above entitled cause was regularly called for hearing upon the docket of said court for that day, and the plaintiff appeared by its solicitors, Frank Lee, United States attorney, and O. H. Graves, special assistant United States attorney, and the defendants appeared by their solicitor, J. M. Springer; and this cause having been heretofore, on January 12, 1921, called for trial, proper appearances having been made, and both parties having announced ready for trial, a partial trial was held and testimony was taken herein; and thereupon said cause was continued to January 13, 1921, and further trial was held and testimony taken; and thereupon said cause was continued to January 31, 1921, and further trial was held and testimony taken; and thereupon, at the conclusion of the testimony and proceedings herein, the court took all the evidence and proceedings had and held

under advisement, and announced that further testimony would be permitted if desired by either party, and the cause thereupon was further continued; and being regularly set for trial upon this date, the complainant offers in evidence a certified copy of complainant's Exhibit "B" to its bill of complaint, to-wit: A contract made and entered into July 15, 1918, by and between Nathaniel Perryman and wife and the defendant, J. W. Sunderland; to the admission of which the defendant then and there objected, and objection being overruled, it was duly admitted. Complainant thereupon offered in evidence a duly certified copy of complainant's Exhibit "C" to its bill of complaint, to-wit: A lease made and executed November 6, 1918, by Nathaniel Perryman to the defendant, J. W. Sunderland; to which offer the defendant then and there objected; the objection was overruled and the lease admitted. Complainant thereupon offered in evidence a duly certified copy of complainant's Exhibit "D" to its bill of complaint, to-wit: A deed made and executed November 30, 1918, by and between Nathaniel Perryman and wife and the defendant, J. W. Sunderland; to the introduction of which defendant then and there objected; and the objection was overruled and the deed admitted. The complainant thereupon closed its testimony and case, and the defendant thereupon closed his testimony and case; and the court, upon due consideration of all of the evidence introduced in said cause and being fully advised in the premises, finds the issues for the complainant, the United States of America.

The court further finds that Nathaniel Perryman is enrolled opposite Roll No. 2220 on the final rolls of the Creek Nation, as a half-blood Creek Indian; that the land in controversy was purchased by the Superintendent for the Five Civilized Tribes, under the direction of the Secretary of the Interior, with funds on deposit in his hands, and under his official supervision, which were the proceeds of the sale of the homestead allotted to the said Nathaniel Perryman and were restricted funds; that the deed executed by the grantors of the said land, to Nathaniel Perryman, was executed under the direction of the Secretary of the Interior, and, by his direction, as a part of the habendum clause thereof, said deed contained the following:

"* * * subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification UNLESS MADE WITH THE CONSENT OF AND APPROVED BY THE SECRETARY OF THE INTERIOR."

It is, therefore, ordered, adjudged and decreed that Nathaniel Perryman is the owner in absolute fee simple of all that certain real estate situated in the Eastern District of Oklahoma, and described as follows, to-wit:

The Southeast quarter (SE¼) of Section eight (8), Township sixteen (16) North, Range thirteen (13) East, containing one hundred sixty (160) acres, more or less,

in Tulsa County, Oklahoma, and that, under the provisions of the laws of the United States, the said land was at all times mentioned in the bill of complaint herein and now is wholly incapable of alienation or encumbrance by the said Nathaniel Perryman, or any other person, during the lifetime of said Nathaniel Perryman, prior to April 26, 1931, "unless made with the consent of and approved by the Secretary of the Interior."

It is further ordered, adjudged and decreed by the court that the hereinafter described deeds and instruments be, and the same are, hereby set aside, canceled and removed from the title of the said Nathaniel Perryman in and to said land, and that title thereto be, and the same is hereby forever quieted in the said Nathaniel Perryman, to-wit:

1. That certain instrument in writing, dated November 30, 1918, recorded in book 264, page 333, of the records of Tulsa County, Oklahoma, executed by Nathan Perryman and Fannie Perryman, purporting to be a warranty deed in favor of the defendant, J. W. Sunderland, set out in the bill of complaint as Exhibit "D;"

2. That certain instrument in writing, dated February 20, 1919, of record in Tulsa County, Oklahoma, executed by Nathaniel Perryman, purporting to be a warranty deed in favor of the defendant, Fannie Perryman, set out in the bill of complaint as Exhibit "E;"

3. That certain judgment of the Superior Court of Tulsa County, Oklahoma, entered on April 28, 1919, in civil case No. 5919, set out in the amendment to the bill of complaint as Exhibit "F;"

That the leases, designated as complainant's Exhibits "B" and "C" to its bill of complaint—said Exhibit "B" being a certain instrument in writing, dated July 15, 1918, recorded in book 242, page 374, of the records of Tulsa County, Oklahoma, executed by Nathan Perryman and wife, Fannie, purporting to be a rental contract in favor of the defendant, J. W. Sunderland; said Exhibit "C" being a certain instrument in writing, dated November 4, 1918, recorded in book 254, page 65, of the records of Tulsa County, Oklahoma, executed by Nathan Perryman, purporting to be a rental contract in favor of the defendant, J. W. Sunderland—be not can-

celled, but the same are permitted to remain as valid and subsisting leases, according to the terms and tenor thereof.

It is further ordered, adjudged and decreed by the court that the defendants, J. W. Sunderland and Fannie Perryman, and each of them, their heirs, assigns or legal representatives, and each of them, are hereby perpetually enjoined from setting up any claim of title to said real estate or any part thereof, and that each of them is without any right, title, interest or estate in or to the aforesaid premises under and by virtue of the said instruments; that said instruments are wholly null and void; that the defendants and each of them, and all persons claiming by, through or under them are hereby enjoined from in any manner interfering with the use and possession of the said lands by the said Nathaniel Perryman, by virtue thereof.

It is further ordered that the costs hereof be taxed against the defendant, J. W. Sunderland. And hereof let execution issue. All of which is by the court, on the date first aforesaid, finally ordered, adjudged and decreed, and to all of which finding and judgment of the court the defendant, J. W. Sunderland, then and there excepted and still excepts, and in open court in the presence of counsel for the plaintiff serves notice of his intention to appeal to the Circuit Court of Appeals of the Eighth Circuit, and at this time requests the court to fix the appeal bond, which is by the court fixed at the sum of $500.00, the same to be approved by the clerk.

R. L. WILLIAMS,
Judge.

O. K. J. M. Springer, Attorney for Defendant, J. W. Sunderland.

Filed Jan. 25, 1922, W. V. McClure, Clerk U. S. District Court.

Statement of the Evidence.

Be It Remembered, That on this the 12th day of January, 1921, this cause coming on for hearing before the Honorable R. L. Williams at Tulsa, Okla., and the plaintiff being represented by Mr. L. K. Pounders and the defendants being represented by Messrs. Springer & Wilson, and counsel for the plaintiff and the defendants announcing to the court that they were ready to proceed with the trial of this cause, the following proceedings were had, to-wit:

Whereupon Mr. J. S. LeCROIX, a witness on behalf of the plaintiff, being first duly sworn according to law, was called to the witness stand and testified as follows, to-wit:

Direct examination of Mr. J. S. LeCROIX by Mr. Pounders.

Q. Your name is LeCroix? A. Yes, sir.

Q. Your initials? A. J. S.

Q. You are an employee of the Five Civilized Tribes of Muskogee? A. Yes, sir.

Q. Your duties are with the restriction division?

A. Yes, sir.

Q. Mr. LeCroix, as such employee have you had occasion to investigate and become familiar with or do you know the accounts or funds handled by the Suprintendent of the Five Civilized Tribes for Nathaniel Perryman, Creek Indian, No. 2220? A. Yes sir, I do.

Q. Will you state what funds were on deposit with the Superintendent in the year 1918 — I don't mean the amount, but what source were the funds, if any, from?

Mr. Springer: We object to that as not being the best evidence and further that no proper foundation is laid for this testimony.

The Court: What do you mean by no proper foundation?

Mr. Springer: I assume there must be — under the allegations of this bill they must prove first there was a homestead allotted to Nathaniel Perryman.

The Court: Yes, I think so.

Mr. Pounders: I will withdraw this for a moment. At this time plaintiff offers in evidence the duly certified copy of the homestead patent issued to the allottee just named, the same being marked plaintiff's exhibit 1.

Mr. Springer: There will be no objections.

Mr. Pounders: This shows, your Honor, that the lands allotted to this Indian are located in section 7, township 19 north and range 13 east.

Mr. Pounders: Plaintiff further offers in evidence certified copy of order of Secretary of Interior made on September 29, 1910, relating to said allottee as plaintiff's exhibit 2.

Mr. Springer: Defendant has no objections.

Mr. Pounders: Plaintiff also offers in evidence plaintiff's exhibit 3 being certified copy of a counterpart of said order shown by exhibit number 2.

Mr. Springer: Defendants have no objections.

Mr. Pounders: These two orders simply show the removal of restrictions under rules and regulations and methods of sale of part of land shown in the patent.

Mr. Pounders: Plaintiff offers in evidence plaintiff's exhibit number 4 being certified copy of a letter written by the acting Superintendent for the Five Civilized Tribes to the Commissioner of Indian Affairs June 28, 1918, and telegram from the same person to the same officer on June 24, 1918, asking for authority to invest a portion of the land sale funds in the lands involved in this suit.

Mr. Springer: We object to the exhibit for the reason the same is incompetent, irrelevent and immaterial.

The Court: Why is it incompetent?

Mr. Springer: It just simply merely asks for permission to invest the proceeds. I think the letter and telegram are competent after the order is offered—if the order is offered——

Mr. Pounders: It is merely there understanding of the order——

The Court: This is a predicate for the introduction of the order?

Mr. Pounders: Plaintiff offers in evidence plaintiff's exhibit 5, being certified copy of telegram——

The Court: You have already offered them. You may consider them in evidence.

Mr. Pounders: This is a new one—from the Commissioner of Indian Affairs in response to the subject matter in exhibit 4. I want to read that to your Honor. "Referring your telegram and letter June 27th and 28th respectively authority granted you invest on behalf Nathaniel Perryman Nine Thousand Six Hundred Dollars in purchase property therein described using restricted form of deed." Signed "Hauke, Acting Assistant Commissioner."

Mr. Springer: We object to that for the reason it is not properly authenticated in the first place and next place it is not an order conferring authority——

The Court: I will sustain it on the grounds it is not authenticated. I think you have to introduce the telegram——

Mr. Springer: And not the best evidence.

Mr. Pounders: Your Honor has possibly overlooked the statute on that subject. Our Oklahoma Statute says —I don't know whether it goes in this court, but I will call your attention to it, all papers and documents on file——

The Court: But that is a telegram——

Mr. Pounders: But that is the way they transacted business.

The Court: I will sustain the objection .

Mr. Springer: I want to object to exhibit 4 further on the grounds it is a letter and telegram and not a public document.

The Court: Very well, I will sustain the objection.

Mr. Pounders: Note our exceptions.

The Court: I will let you get the original papers and bring them here. I will give you time to do that— but the telegram received by the Superintendent at the telegram office, that is not an official document.

Mr. Pounders: We will have to get that from Washington to get the original telegram.

The Court: No, the telegram received by him in his office. If he has a copy of it I will permit you to put him on the witness stand to show he sent it.

Mr. Pounders: But this is a copy of a telegram received by Parker from the Commissioner.

The Court: You subpoenae him up here and let him bring the copy he has and I will let you introduce it.

Mr. Springer: We would object on the grounds the telegram received is not the one sent.

The Court: I will let him introduce the copy received.

Mr. Pounders: The telegram is an official document.

The Court: Where is it?

Mr. Pounders: Muskogee.

The Court The copy sent from Washington is. I will let you introduce the one sent from Washington.

Mr. Pounders: The one that confirms——

The Court: If you have a letter in which they say we confirm the telegram, I will let you introduce that. I will continue the case and let you get the evidence here, the originals. They are only delaying the case.

Mr Springer: I think we should insist on our objections.

The Court: Very well.

Mr. Pounders: Shall I proceed with our other testimony?

The Court: No, wait until you get the other evidence.

Mr. Pounders: Your Honor, there is an act passed

by Congress permitting Gabe Parker to invest funds without this. I will, I will submit it without that testimony.

The Court: Where is that?

Mr. Pounders: I have not got it, but I can get it.

The Court: You ought to have it here.

Mr. Pounders: I could not bring all the books over here. I think I can get it here in town.

Mr. Springer: They could not do it because the Secretary of the Interior is the only one that can impose the restrictions.

The Court: I don't think the Superintendent of the Five Civilized Tribes could impose restrictions. The Circuit Court of Appeals did not hold that.

Mr. Pounders: Very well. I am just waiting and we will get the originals on this.

Mr. Springer: I don't want to take any advantage—I want to urge an objection to exhibit number 2 for the reason the same is incompetent, irrelevant and immaterial and not a public document and not properly authenticated.

The Court: Get the original.

Mr. Pounders: This is the original.

Mr. Springer: The grounds of our objection are not being a public document, they cannot make it authentic so it can be certified.

The Court: Bring the original.

Mr. Springer: I want to object to exhibit 3 for the same reason.

The Court: Bring the original. The originals are on file in their office. Bring them all. Court will take a recess until two o'clock.

Mr. Springer: I understand this case is continued for the term?

The Court: No, continued until tomorrow. They say they can get the evidence here this afternoon. Court will take a recess until two o'clock.

Whereupon court took a recess until two o'clock, P. M.

Morning Session.

Whereupon court having been opened in due form of law on this 13th day of January, and counsel for the plaintiff and defendant being present in court and announcing to the court they were ready to proceed with the trial of this cause, the following further proceedings were had, to-wit:

Whereupon Mr. LeCROIX was recalled to the witness stand for further direct examination.

Further Direct Examination of Mr. LeCroix by Mr. Pounders.

Q. You are the same Mr. LeCroix who was on the witness stand yesterday? A. Yes, sir.

Mr. Pounders: Mark this plaintiff's exhibit 8.

Q. Mr. LeCroix, I hand you what purports to be a carbon copy of a letter dated June 28th, 1918, and addressed to the Commissioner of Indian Affairs and signed by Joe H. Strain, Acting Superintendent for the Five Civilized Tribes, can you state to the court whether that is an official record copy of that letter constituting a part of the files of the office of Superintendent for the Five Civilized Tribes at Muskogee?

Mr. Springer: I object as being incompetent, irrelevant and immaterial and calling for a conclusion of this witness.

The Court: What is that, Mr. Witness?

A. That is our record copy, original record.

The Court: You mean you keep an official record of every letter written from the Superintendent's office to the Commissioner of Indian Affairs?

A. Yes, sir.

The Court: The rules of the Department require that?

A. I think they do. I know it has been the practice ever since I have been there.

Mr. Springer: We object further because there is no proper foundation laid for this testimony as yet.

The Court: Why?

Mr. Springer: I apprehend the law to be this, the Act authorizing the Secretary of the Interior to make investments or to release restricted lands and to invest the proceeds under such rules and regulations as he may prescribe—now I apprehend the first step to be taken is to introduce a set of rules and regulations promulgated by the Secretary of the Interior.

The Court: I think so. Of course the court takes judicial knowledge.

Mr. Springer: The court cannot take judicial knowledge of anything except the law.

The Court: The court takes judicial knowledge of the rules but has to be advised.

Mr. Springer: First there has to be a set of rules in existence and unless there is, the court could not take judicial knowledge and suppose there had not been any rules promulgated?

The Court: Yes, but this court takes judicial knowledge of the law.

Mr. Springer: But there is no law.

The Court: Where are the rules and regulations?

Mr. Pounders: They are in a compiled form, and not to take too much time, the one as amended promulgated on 20th of April, 1912, reads this way: "All moneys received by the cashier of the Union Agency or his successor in authority on account of deferred payments and accrued interest thereon shall be deposited or held to the credit of the proper allottee in the individual bank account and to be subject to the rules and regulations and orders of the Department governing the holding of moneys so deposited and disbursements thereof." I emphasize the word "orders" because the regulations——

The Court: Let that be read into the record.

Mr. Springer: That don't show any rules or regulations for disbursement of the money——

The Court: Let's see about that. That is section what?

Mr. Pounders: It is the one I have marked. It is the amended——

The Court: Get me the decision in the late case. Have you got that? Have you got it?

Mr. Pounders: No, sir, I had to go to Sapulpa and could not bring the books from there.

The Court: You ought to have them here.

Mr. Pounders: I can get them in town.

The Court: Certainly, but you ought to have them here. What report is it in?

Mr. Pounders: 250 Federal.

The Court: Mr. Bailiff, get me 250 Federal. The court will be at ease until he gets back. Have you got it, Judge Springer?

Mr. Springer: No, sir—but there is another objection I want to urge. The rules and regulations prescribed by the Secretary of the Interior by which he seeks to impose restrictions on lands—until that is introduced there is no foundation for this.

The Court: We will see. Court will be at ease.

Whereupon court having been resumed again, the following proceedings were had:

The Court: Now what was your money derived from?

Mr. Pounders: Sale of a part of the restricted allotment.

The Court: You may read into the record all of the amendment of April 20, 1912. Show it to him so he can make his objection.

Mr. Pounders: I don't want to get myself in the attitude of pleading any special rule and regulation by so doing it.

The Court: Very well, but you may read into the record that part of it for the benefit of the court. That is not pleading it.

Mr. Pounders: I meant relying on any special one.

The Court: Let it show in the record that in reading the rules and regulations into the record the Government is not waiving any other rules and regulations that have been promulgated by the Secretary of the Interior, it being the contention of the Government that the court takes judicial knowledge of such rules and regulations but these rules and regulations are read into the record for the purpose of advising the court as to the contents of such rules and regulations as are here specifically called attention to.

Mr. Springer: We object to reading section 29 of the rules and regulations in evidence, proposed or offered by the Government, for the reason the same is incompetent, irrelevant and immaterial and for the further reason that no proper foundation has been yet laid for reading of the rules and regulations in evidence.

The Court: Very well, the objection is overruled.

Mr. Springer: We except.

Whereupon Mr. Pounders read all of section 29. (Note: See exhibits.)

Mr. Pounders: Also want to call your attention to section 23.

The Court: Very well, and section 23 and 28 may be read into the record for the benefit of the court.

Mr. Springer: We object to reading sections 23 and 28 in evidence for the reason the same is incompetent, irrelevant and immaterial and not proving any issue, and further that no proper foundation has been laid for the admission of such testimony.

The Court: Now, you have already proved that this land was allotted to this member of this tribe?

Mr. Springer: Introduced the allotment deed but have not proved the fact of the allotment but issuance of the patent.

The Court: I think that is sufficient.

Mr. Pounders: The answer admits it.

The Court: Let's see the answer. The patent is the highest evidence that the allotment has been made. That is the way it occurs to me. Up to the time the patent was issued I think you would have to go through the form of showing application had been made and certificate—the certificate of allotment is evidence of the patent. I believe the treaty says the certificate will be evidence of it.

Mr. Pounders: I am not so sure as to this tribe, but that is true in the Choctaw and Chickasaw Nations.

The Court: Yes, and that is a part of the treaty because it is not contemplated that the patent will be issued until some time afterwards. But when patent is issued, that is the highest evidence, because the patent is signed by the principal chief and countersigned by the Secretary of the Interior.

Mr. Springer: My recollection is that the answer does admit that, admits the allotment.

The Court: You admit, says "But alleges as a matter of fact only a portion thereof was sold."

Mr. Pounders: Yes, that is a negative admission.

The Court: "And that the remainder thereof is still the homestead of Nathaniel Perryman and occupied by him and of the value * * * " These are cold-blooded questions of fact. Just harass the court. I am not going to let this case go up on technicalities. Let me see the patent issued.

Mr. Springer: We want to object to the introduction of exhibit 1 in evidence because no proper foundation has been laid.

The Court: What do you mean? Be more explicit.

Mr. Springer: To prove that the allotment was made and the patent is not evidence of that fact.

The Court: The objection is overruled.

Mr. Pounders: It was admitted yesterday.

The Court: He may move to strike.

Mr. Springer: We move to strike exhibit one as being incompetent, irrelevant and immaterial and for the introduction of the exhibit.

The Court: It is overruled, first, because the defend-

ant in his answer admits that the allotment had been made. I notice in the separate answer of J. W. Sunderland the following: "he specifically denies that pursuant to and under the rules and regulations of the Secretary of the Interior the homestead allotment of Nathan Perryman was sold by the Secretary of the Interior but alleges as a matter of fact that only a portion thereof was sold and that the remainder thereof is still the homestead of the said Nathan Perryman and is occupied by him as such and is of the value of $20,000.00." This patent which appears as a homestead deed covers the land alleged by the complainant in its complaint to be the homestead allotment? That correct?

Mr. Pounders: We don't describe it but simply state it was the homestead allotment.

The Court: I see—I will strike that out. Very well, your objection is overruled.

Mr. Springer: We reserve an exception.

The Court: Now, in the Creek Nation, did they issue certificate of allotment?

Mr. Pounders: Yes, they did.

The Court: Have you got it here?

Mr. Pounders: No, sir.

The Court: Could you get it here?

Mr. Pounders: I can get it here tomorrow.

The Court: Very well, I will hold this case until tomorrow and let you put it in. I will hold this case a month if necessary. I will not let this case go up on technicalities. If they want to encumber the record and put all the records of the land office in this record they may have them. Go ahead.

Q. Was your answer to the question—what was your answer with reference to the copy of letter you hold in your hands as to the same being an official copy written by the Superintendent of the Five Civilized Tribes?

A. This is an office——

Q. It is an office copy?

A. Yes, sir. We call it a record copy.

Mr. Pounders: If the court please, plaintiff offers in evidence plaintiff's exhibit 8.

Mr. Springer: We object to the exhibit for the reason the same is incompetent, irrelevant and immaterial.

The Court: I will let you get Mr. Strain up here.

Mr. Pounders: Your honor, he claims to be sick—

claimed to be sick yesterday. I don't know whether we can get him here or not.

The Court: I will let you continue it over and let you get him here as a witness and prove these things.

Mr. Pounders: I would be very glad to have him come.

The Court: Yes—I am going to have the Government get the best evidence they can.

Mr. Pounders: Just to keep the record straight——

The Court: I will not let it in now.

Mr. Pounders: Exceptions.

The Court: You may have your exceptions and I don't like the way the Government does—coming up here and trying to get these cases over——

Mr. Pounders: I think the court is laboring under a misapprehension——

The Court: No——

Mr. Pounders: If the court will hear me as to the law in this case, I want to read an Act of Congress, April 26, 1906, section 8——

The Court: You can get the records up here. You can bring him up here and take all these questions out of the domain——

Mr. Pounders: Already——

The Court: Yes, but when the bank cases are tried the United States attorney brings bank clerks down here and keeps me on the ragged edge and I am getting tired of it.

Mr. Pounders: Shall we proceed with the other evidence?

The Court: Yes. Now, I am expecting the Government to get the best evidence they can, when they come into court—not to have the judge taking up his time splitting hairs. If you could not get this other evidence and this was the best evidence you could get and all that was obtainable, it woud be a different question, but these men are on the pay of the Government and the man that wrote the letter is just as available to come here as this man.

Mr. Pounders: Mark this exhibit 9 of the Government.

Q. Mr LeCroix, I hand you what purports to be a telegram received in Muskogee sometime during the year 1918, addressed to Parker, Superintendent, and signed Hauke, Acting Assistant Commissioner. Can you state whether that is

an official paper and record in the Nathaniel Perryman case in the office of the Superintendent of the Five Civilized Tribes?

Mr. Springer: We object to the question as it is framed as calling for a conclusion of the witness and further as to the capacity of the witness to testify.

The Court: Yes, I think that calls for a conclusion. Are you the custodian of that paper?

A. I am not the custodian of the paper.

The Court: I sustain the objection.

Mr. Pounders: I except.

Mr. Pounders: Your honor, it is a little out of the ordinary, but at this time I ask this be marked as plaintiff's exhibit 10.

The Court: Who is the custodian of that?

A. The mail room has charge of that.

The Court: The superintendent and assistants are the real custodians of that paper?

A. The superintendent or acting superintendent.

The Court: The superintendent and acting superintendent are the real custodians of that paper?

A. Yes, sir. I think the assistant superintendent would have that in his files.

The Court: Who is the assistant superintendent?

A. Mr. Strain.

Mr. Pounders: Plaintiff offers in evidence plaintiff's exhibit 10 so far as the same relates to the photostatic copy of the check made payable to Nathaniel Perryman and drawn on the Treasurer of the United States and by him endorsed to L. K. Cone and G. R. McCullough and marked paid through the various banks.

Mr. Springer: We object to the exhibit, not sufficiently authenticated.

The Court: Why not?

Mr. Springer: It is not a public document that can be authenticated by certificate and not required to be kept in files so as to become a public document and subject to authentication by certificate.

Mr. Pounders: As to this part, it is not offered, it is not material. I don't know why included—it is the second that is offered——

The Court: The objection is overruled.

Mr. Springer: We except. Want to object to it further because there is no proper foundation laid. It purports to be a check in addition to——

The Court: I suppose all this evidence that is not presented orderly—I presume that the foundation will be laid.

Mr. Springer: Of course if the foundation is laid the objection should be overruled.

The Court: I will overrule it now and I will allow you renew the motion later on. By what statute do you claim the Secretary of the Interior can certify to these?

Mr. Pounders: I have been looking for that. It is a Federal statute but my recollection is not of sufficient definiteness as I found it to read it to the court, but there are many decisions in line. I have not been able to lay my hands on these since the question came up. I have no digest accessible. I am not just able to look up the law away from my office and away from my books.

The Court: You ought to have it briefed. I will not rule on the question. Just strike it out and I will rule on it when you show me your authority. That is not a public record but a record of the Treasurer of the United States. Show that he can certify as to what the records show in his office.

Mr. Pounders: Your honor would not care to hear what Cyc says on that?

The Court: Well, yes.

Mr. Pounders: It is a general principle of every document or books of a public matter——

The Court: This is not of a public matter. This is an office record. It relates to private matters.

Mr. Springer: That is the grounds of our objection. Not a public document but purely a private record.

Mr. Pounders: That is a distinction and I am not prepared to assert——

The Court: Well, the authorities make the distinction.

Mr. Pounders: I find further that in the Land Office they do refer to letters and things of that character as parts of the record.

The Court: Get me the decisions here that hold that.

Mr. Pounders: I will look that up, your honor.

Mr. Pounders: Plaintiff asks this be marked Government's exhibit 11. At this time we offer in evidence the original deed by grantor McCullough and Lawrence K. Cone and his wife to Nathaniel Perryman.

The Court: Any objections?

Mr. Springer: We object, first, that it is incompetent, irrelevant and immaterial to prove any issue in this case, and next, it has not been sufficiently or properly identified.

The Court: Why?

Mr. Springer: No authentication.

The Court: Why?

Mr. Springer: I see no certificate—

The Court: That is the original deed.

Mr. Springer: Yes, but don't prove it is, and object next for the reason this purported deed pretends to impose restrictions on unrestricted land contrary to and in violation of the rights of this state and not being in the right of Congress to impose restrictions on unrestricted land in this state.

The Court: You claim under the same title they do? Let me see the answer. "The defendant further specifically denies that there was incorporated in the habendum clause of the deed from Grant R. McCullough and Clara McCullough, his wife, and Lawrence K. Cone and Kate P. Cone, his wife, a restriction against the alienation of the land described in said deed pursuant to any rules or regulations of the Secretary of the Interior and denies that any restrictions therein contained was authorized by such rules and regulations, etc."

Mr. Springer: We object to it further on the ground there is no rule or regulation introduced or shown that it imposes restrictions and object further on the ground there is no record here or any order made under the seal of the Secretary of the Interior affecting real estate that would impose restrictions, and further there has been no proper foundation at all laid at this time for the introduction.

The Court: I will admit the deed for the present. It may be introduced for the present.

Mr. Springer: We reserve an exception.

The Court: You don't deny in your answer the deed was executed by McCullough?

Mr. Springer: No, sir.

The Court: You deny there was any authority of law for incorporation of that clause?

Mr. Springer: Yes, and until they do introduce something here that shows it was the general or specific order affecting this real estate issued under the seal of the Secretary of the Interior and properly recorded in the office

of the register of deeds or some other place so as to serve notice on the defendant it would not affect his right of purchase and the burden is on them to prove all those things before they can introduce this deed in evidence.

The Court: Proceed.

Mr. Pounders: Plaintiff offers in evidence plaintiff's exhibit 12, being one of the exhibits to the original petition herein and having been certified to within the past few days and being deed by Nathaniel Perryman to Fannie Perryman, covering the land involved in this litigation.

Mr. Springer: We object to it for the reason there is no authentication and being incompetent, irrelevant and immaterial.

The Court: What deed is that?

Mr. Pounders: Husband back to the wife.

The Court: Let me see that deed.

Mr. Pounders: I said husband back to the wife. It is husband to the wife. It is one of the clouds we seek to cancel.

The Court: This covers what land?

Mr. Pounders: Some of the land in suit and that deed is offered in evidence for the sole purpose of showing the cloud thereby.

Mr. Springer: We withdraw our objection to that. That deed does not affect us at all.

The Court: Very well.

Mr. Pounders: I do not recall the court's ruling on yesterday with reference to exhibit number 7, but we now merely call the court's attention to it as embodying the general rule or regulation—no, that is not the one, beg your pardon, Mr. Stenographer—I seem to have mislaid that temporarily. I don't know where it has gotten to. Your honor will pardon me just a moment? I will step into the office and see if I could have overlooked it in there.

Mr. Springer: I made a mistake in my objection to that deed. I want to correct it by moving to strike. Defendant, Sunderland, moves to strike from the record exhibit 11 of the plaintiff for the following reason: first, that the deed, the exhibit has not been identified; second, it is not within the power of the Secretary of the Interior to impose restrictions on unrestricted land.

The Court: My understanding is he just offered it to show the cloud on the title, to give it equitable cognizance.

Mr. Springer: The deed—I don't believe the court understands—the deed they are seeking to cancel?

The Court: Yes, but your client don't deraign any title from that deed.

Mr. Springer: My client deraigns title direct so that deed——

The Court: Who?

Mr. Springer: He deraigns his title direct from that deed—that is, deed from G. R. McCollough and his wife to Nathaniel Perryman and Perryman's deed to Sunderland.

The Court: My understanding is that deed is from Perryman to his wife.

Mr. Springer: This is the deed from Perryman to his wife, exhibit 12.

The Court: That what you are objecting to?

Mr. Springer: No, sir, I am objecting to deed being introduced by McCullough and wife to Nathaniel Perryman. But I said it was not within the power of Congress—I believe it is—but I am moving to strike on the ground it is not within the power of the Secretary of Interior to impose restrictions.

The Court: Very well, the deed is admitted.

Mr. Springer: We except.

Mr. Pounders: I call the court's attention to exhibit 7 for the purpose of advising the court of the promulgation of the rule or regulation as to the form of deed used by McCullough and Cone conveying to Perryman.

The Court: That the rule you are introducing?

Mr. Pounders: No, sir. The order——

The Court: Where is the order adopting that rule?

Mr. Pounders: As far as I know it is just embodied in the——

The Court: You would have to put somebody on the witness stand and prove that is the form unless adopted by rule.

Mr. Pounders: That is the way they did.

The Court: Then you would have to introduce the rule. I sustain the objection at this time.

Mr. Pounders: I am not offering anything in evidence.

The Court: Unless you can show some rule the court would take judicial knowledge, you would have to prove the——

Mr. Pounders: I apprehend this is one of the regulations governing such matters.

The Court: Where is the regulation?

Mr. Pounders: Contained in that particular correspondence.

Mr. Springer: Oh, we object, if it does not contain an order adopting the rule, we object.

Mr. Pounders: The last page of the letter says: "Form of deed herewith inclosed" or "attached."

The Court: You had better wait until you can get the custodian. I sustain the objection at the present time.

Mr. Pounders: I am not offering anything in evidence just now.

The Court: The only way you will get it before the court is by proving it. That don't have the force of a general rule and regulation by the Secretary of the Interior.

Q. Mr. LeCroix, is that form of deed which you hold in your hand and which is plaintiff's exhibit 11, the form furnished and kept?

The Court: That is not the way to prove that. The way to prove that is to take the letter that you have from Washington when you get Mr. Strain on the stand and prove what it is. That is not a general rule. That is a special rule.

Mr. Pounders: I believe, your honor, if you will permit me just a moment—a telegram which will come on later and is in reference to words, "restricted form of deed"—without some little explanation that would not be altogether determined——

The Court: I don't understand—what is your duties in the Land Offce?

A. I have charge of the public records in the restriction division. That is a part of the restriction division records.

The Court: Very well, go ahead. Anything he knows he may testify about.

Q. Is this form of deed, the form used in purchase of land where trust funds are used, is that the practice to use that form of deed? A. Yes, sir.

Mr. Springer: I object as being incompetent, irrelevant and immaterial and no proper foundation laid.

The Court: He testifies he is public custodian of that kind of record and he knows this is the form used for such purpose, that is the practice by the Interior Department. Overruled.

Mr. Springer: We except. The court understands I am objecting further there is no proper foundation laid?

The Court: If you were to go ahead and get all that rot in there—I am going to to let them get this other evidence in here. Go ahead, I am going to continue this case. When he gets through I am going to set this case for the 31st day of January at Muskogee. I am going to get all this record in here.

Q. In reference to that deed——

The Court: It does not seem like the Government knows how to try a case and I am going to see it is tried properly.

Q. What do you call that deed?
A. A special form of deed, special form restriction deed.
Q. Restriction deed? A. Yes, sir.

Mr. Pounders: That is all with this witness at this time.

The Court: Have you got anything else at this time?

Mr. Pounders: Nothing but the receipt of Mr. Cone and Mr. McCullough of the check introduced in evidence. There may be no objection to introducing the receipt. If there is——

The Court: Have you any evidence you want to introduce? I am going to continue the case and set it down for January 31st at Muskogee. If you have any witnesses here I will hear them now.

Mr. Pounders: This letter—any objections to that, exhibit 13?

Mr. Springer: Only on the grounds it is incumbering the record. I don't think it proves anything.

The Court: Overruled.

Witness dismissed.

Mr. Springer: I want to introduce a petition filed in the case of J. W. Sunderland vs. Nathaniel Perryman. Grant R. McCullough and Lawrence K. Cone, filed in the Superior Court of Tulsa County, Dec. 3, 1918, involving the same land in controversy here as defendant's exhibit 1.

Mr. Springer: Also want to introduce in evidence the summons in the case as exhibit 2, the summons served and returned.

The Court: Now let me suggest, Mr. Pounders, you send to Washington and get certified copy of the original telegram and not rely on this copy down here.

Mr. Pounders: I am willing to do whatever the court desires.

Mr. Springer: We introduce journal entry made and entered in this case and filed of record March 22, 1919, and marked exhibit 3 of the defendant.

Mr. Springer: I believe, if your honor please, that is all the evidence we have here.

Mr. Pounders: Call Mr. James Watson.

Whereupon Mr. JAMES WATSON was called and having been duly sworn according to law, took the witness stand and testified as follows:

By Mr. Pounders:

Q. State your name? A. James Watson.

Mr. Pounders: Just at this time I want to call the court's attention I have not had an opportunity to object to the various——

The Court: You may examine him and get your objections in later. He may spread the objections into the record later.

Mr. Springer: Just one more exhibit we desire to introduce in evidence, exhibit 4, being the original journal entry in this case.

Mr. Pounders: I will have an opportunity later to interpose an objection?

The Court: Yes, I will let you put your objections in.

The Court: Mr. Watson, did you appear in this case in the Superior Court?

A. Yes, sir.

The Court: At whose instance?

A. Nathaniel Perryman's.

The Court: Did you have any instructions from the Secretary of the Interior to appear and represent the Government?

A. No, sir. On the other hand, I appeared there for this Indian and I made a report to the Commissioner of Indian Affairs and asked what I should do, whether I should defend this action in the Superior Court here for the Indian or refer it to the Department of Justice. In other words, I made my report as to this case pending and asked for a continuance of the court and explained to the court that I was making a report to the Commissioner to get instructions.

The Court: And after you received instructions you never appeared any more?

A. No, sir, never appeared any further.

The Court: So the appearance you made was at the request of Perryman?

A. Yes, sir.

Cross Examination of Mr. James Watson by Mr. Springer.

Q. Have you a copy of your report in your files that you can produce here?

A. I have a copy of the letter that I wrote to the Commissioner of Indian Affairs.

Q. Regarding this case? A. Yes, sir.

Q. Will you produce it so we can make it a part of the record here?

A. I will if the court instructs me to, otherwise don't care to.

Q. Have you the answer to the report you made to the Secretary of the Interior from the Department of Justice?

A. I have a letter from the Commissioner of Indian Affairs stating the matter was being referred to the Department of Justice and the Department of Justice would bring suit in the name of—in the Federal Court in the name of the Government to quiet title.

Q. You have that kind of report from the Secretary of Interior Department?

A. I have from the Commissioner of Indian Affairs.

The Court: All that will go in the record, is at the time he made appearance, made it for the Indian, had no directions from the Superintendent or Secretary of the Interior to make appearance and reported the matter to the Secretary of the Interior and under instructions from the Secretary of Interior he did not appear further for the Indian or Government. That is a collateral proceeding.

Mr. Springer: I think, your honor, please, section 6——

The Court: That is all that goes in the record.

Mr. Springer: Section 6 of Act of May 27, 1908, confers upon him the authority to make this appearance and binds the Government as agent of the Secretary of Interior.

The Court: Binds the Government?

Mr. Springer: Yes, I think so.

The Court: Read it.

Mr. Springer: The part I want to call your honor's attention to particularly is this——

The Court: Read what the statute says.

Mr. Springer: "That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that state or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deterioate in value by reason of the negligence or carlessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge."

Here is the part I claim applies to this case:

"And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof * * * ."

That refers to minors and adults alike——

"Prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character * * *."

If that don't bind him when he makes appearance——

The Court: Might bind Perryman but not the Government. That was in the Superior Court and not probate court.

Mr. Springer: It was in the Superior Court of Tulsa County.

The Court: Let the record show, Mr. Clerk, the case is now transferred to Muskogee and set for January 31st for further introduction of evidence.

In the United States District Court in and for the Eastern District of Oklahoma. United States of America, Plaintiff, vs. J. W. Sunderland, et al., Defendants. No. 2567, Equity.

Be it remembered, that on this 31st day day of January, 1921, this cause coming on for hearing before the Honorable R. L. Williams at Muskogee, Oklahoma, and the plaintiff being represented by Mr. L. K. Pounders, assistant United States attorney, and Messrs. Springer & Wilson, counsel for defendants, and both sides announcing to the court they were ready to proceed with the trial of this cause, the following proceedings were had, to-wit:

Mr. Pounders: At this, the first opportunity, plaintiff objects to the introduction of any evidence or testimony relative to suit and judgment in the courts of Tulsa County affecting the land involved in this action for the reason that same is irrelevant, immaterial, and for the further reason that it does not appear that the plaintiff was a party to such litigation.

The Court: Overruled.

Mr. Pounders: To which we except. Is your honor clear on what I am driving at?

The Court: Is this the one holding——

Mr. Pounders: No, sir, entirely different case. In this case the allottee is in the court room—the land was purchased on the same form of deed——

The Court: I will reserve my ruling. Why didn't you do it at the time?

Mr. Pounders: I asked your honor if I must do it

then and your honor said do it later, and we just passed it over.

The Court: Very well, I will reserve my ruling. Proceed.

Whereupon Mr. JOE H. STRAIN, a witness on behalf of the plaintiff, being first duly sworn according to law, was called to the witness stand and testified as follows, to-wit:

Direct Examination of Mr. Joe H. Strain by Mr. Pounders:

Q. State your name. A. Joe H. Strain.
Q. What official position do you hold, if any?
A. Financial clerk for the Five Civilized Tribes.
Q. And as such financial clerk, does it ever become your duty to act as superintendent for the Five Civilized Tribes?
A. I am assistant superintendent—financial clerk with capacity of assistant superintendent and act in Mr. Parker's absence.

The Court: The financial clerk is assistant to the superintendent?

A. Yes, sir.

The Court: And in the absence of the superintendent act as superintendent?

A. Yes, sir.

The Court: How long have you been in that capacity?

A. Since 2nd of April, 1915.
Q. I hand you what purports to be a carbon copy of letter dated June 28, 1918, marked plaintiff's exhibit 8, and will ask you to examine the same and state whether or not you know who wrote it and are familiar with it?
A. Yes, I dictated and signed that letter.
Q. Is this an official carbon copy—by that—did you retain it in the office?

The Court: That is all is called a duplicate original?

A. Yes, sir.

The Court: Make one copy to be transmitted to Washington and the other to be kept in the office?

A. Yes, sir.

The Court: And made both at the same time?

A. Yes, sir.

The Court: Very well.

Mr. Pounders: Plaintiff renews its offer and introduces it in evidence.

The Court: What did you do with the other copy?

A. Perhaps the custom is to file with the Department.

The Court: Was the other mailed anywhere or sent anywhere?

A. Not that I remember, Judge. The original was mailed to Washington.

The Court: I mean the other copy, the other original copy was sent to Washington?

A. The original was sent to Washington and this duplicate copy kept.

The Court: The duplicate?

A. The one sent to Washington is there, this kept in my files for my reference.

The Court: Your personal reference and office records?

A. Office records under my supervision.

The Court: The other copy went to Washington?

A. Yes, the original went to Washington and this is a copy.

Mr. Springer: Object to the letter for the reason the same is incompetent, irrelevant and immaterial and does not prove any issue in this case.

The Court: How was it sent to Washington?

A. Mailed.

The Court: To whom?

A. Mr. Sells, I presume.

The Court: Commissioner of Indian Affairs?

A. I think so. Let's see. That is where we usually send them, yes, sir.

Mr. Springer: I object further that it is not shown it was received and acted upon by anybody authorized to act upon it.

The Court: Overruled. I presume they will follow that up.

Mr. Springer: I except.

Mr. Pounders: Mark this plaintiff's exhibit 14. Plaintiff offers in evidence plaintiff's exhibit 14, being certified photostatic copy of the original letter, carbon copy of which is shown in exhibit 8.

The Court: This is the one just introduced?

Mr. Pounders: Yes, sir.

Mr. Springer: To which we object for the reason it is not a document contemplated by law that could be proved or identified by a certified copy and as not being properly identified so as to offer it and be admitted in evidence,

and for the further reason of it being incompetent, irrelevant and immaterial.

The Court: What do you mean by it has not been properly identified?

Mr. Springer: You cannot identify a private letter that way by certificate, by the one to whom it was sent, even though he is offered. The law says what instruments shall be admitted in evidence upon certification and this instrument does not come within that provision.

The Court: The way I understand this man's evidence, they make these instruments, one to go to Washington for the officials there—for instance, Commissioner of Indian Affairs, and this copy is made at the same time and retained here?

A. Yes, sir.

The Court: That is in effect a duplicate original. I will overrule the objection and permit this certified copy to be introduced in evidence. Both are signed, the one going to Washington is signed and the one here retained is signed.

Mr. Springer: We reserve an exception.

A. I signed the original and used a stamp on the one here.

The Court: Either signed it in your own name or stamped it?

A. Yes, sir.

The Court: And this is signed——

A. I don't know whether I signed it or not. I do not remember.

The Court: Show it to him?

A. Yes that was stamped.

The Court: You have a stamp with your signature?

A. Yes, sir.

The Court: That is your stamped signature?

A. Yes, sir.

Q. Mr. Strain, I hand you plaintiff's exhibit 15 and I will ask you to state what that instrument is, if you know? First, I will ask you if that is a part of the records of your office?

Mr. Springer: We object as calling for a conclusion of the witness.

The Court: Yes, I will sustain the objection.

Mr. Pounders: Save an exception. I will suggest to the court this paper was found after a quite deal of effort in conformity with what the court indicated. I may not have understood the court's purpose. As I under-

stand, this is a confirmation of the telegram we were trying to get in and to which objection was sustained at Tulsa.

The Court: I will sustain the objection the way the question is asked here: asking him if that is a part of the records of the office—to that question I will sustain an objection.

Q. Mr. Strain, are you the custodian of that paper?

A. I am.

Q. As such custodian, is it a part of the records of the superintendent of the Five Civilized Tribes?

Mr. Springer: Object as calling for a conclusion.

The Court: Overruled.

Mr. Springer: We except.

A. Yes, sir, it is.

The Court: Do you know where it came from?

A. Where the original came from?

The Court: Yes?

A. Yes, sir, it came from the Commissioner's office at Washington.

The Court: Was there anything accompanying it when it came?

A. Nothing but the telegram.

The Court: Did you get it from the telegraph office, or merely the letter of advice?

A. The telegraph office delivered it to our office.

The Court: I sustain the objection.

Q. You mean the telegraph company delivered you this paper? A. They brought the telegram up to our office.

Q. This paper?

A. This is a copy of the one they did bring.

Q. How did you get that paper, through the mails or from the telegraph office?

A. This came through the mail. This is a confirmation. We get confirmation through the mails.

Q. Is that a part of the records of your office?

A. Yes, sir.

Mr. Springer: We object, calling for a conclusion of the witness and immaterial.

The Court: Yes, sustain the objection. It is a conclusion and strike all the evidence in response to the question "Is that a part of the records of your office." Now, you say that is what you call a confirmation telegram?

A. Yes, sir.

The Court: Where did you receive this from?

A. Through the mail.

The Court: What do you mean by through the mail?

A. It was mailed to our office and delivered to me and I filed it and it is a confirmation of the original telegram.

The Court: Now, to whom was it addressed when you say it came through the mail?

A. Gabe E. Parker, I reckon. Practically all of them are addressed to him.

The Court: Where——

Mr. Springer: I object as not the best evidence and calling for a conclusion of the witness.

The Court: Where is the envelope it came in?

A. Don't retain the envelopes, just retain the original.

The Court: What did you do with the envelope?

A. Throwed it in the waste basket.

The Court: Has it been destroyed or in the office?

A. Undoubtedly destroyed.

The Court: How are the envelopes addressed?

A. Either Gabe Parker, Gabe E. Parker, or to myself.

The Court: Look at it and see to whom it would be addressed?

A. Mr. Parker.

The Court: Addressed to the Superintendent of the Five Civilized Tribes?

A. Yes, sir.

The Court: Now, what kind of an envelope did it come in?

A. Well, an ordinary envelope they transmit those in. I did not pay particular attention to that.

The Court: Where did you say it came from?

A. Came from the telegraph office, I suppose, in Washington.

The Court: You say that——

A. As confirmation.

The Court: You say that would come from the telegraph office in Washington?

A. So I understand. The confirmation of the original telegram.

Mr. Springer: We object as being incompetent, ir-

relevant and immaterial and not properly identified, and further that the confirmation comes from the telegram office and the telegram is sent without showing any authority for the sending of same and without it appearing it was sent by the proper authority.

The Court: Yes, I think the confirmatory——

A. I may be mistaken—may come from the Commissioner's office.

The Court: You ought to know.

Q. Can you state whose signature that is?
A. Assistant Hauke.
Q. You know his signature?
A. Yes, I have seen it many times.
Q. That is the signature of Mr. Hauke? A. Yes, sir.

The Court: Very well, I will admit it now on the theory you proved the signature.

Mr. Springer: To which we except. There is one serious objection I want to urge to that telegram.

The Court: What is that?

Mr. Springer: This objection may be acted on now or hold it until later, but my objection is this: Up to this time there is no foundation laid for the introduction of this testimony in this, there had been no order of the Secretary of the Interior releasing restricted funds or investing in other property.

The Court: I will overrule your objection. I suppose that is what they are trying to prove.

Mr. Springer: Will your honor permit me to finish my objection?

The Court: Very well.

Mr. Springer: And object to it further because there has not been any order introduced showing that the Secretary of the Interior imposed restrictions on the land that this suit is brought to cancel this deed on and I perceive the law to be, although I——

The Court: I overrule the objection. This will be a question of law. You can argue the case when the evidence is in.

The Court: Who was C. P. Hauke?

A. Assistant Commissioner.

The Court: Assistant Commissioner of what?

A. Commissioner of Indian Affairs.

The Court: Do you know his signature?

A. I know the one I have been receiving all the time as

Mr. Hauke's signature. Take it for granted it is his signature. Seen it many times.

The Court: You say that is his signature?

A. Yes, sir.

The Court: Go ahead. It may be introduced.

Mr. Pounders: Plaintiff offers in evidence plaintiff's exhibit 16, being certified copy from the Washington office by the Commissioner of Indian Affairs of the telegram referred to in exhibit 15.

Mr. Springer: To which we object for the reason it is not an instrument that can be authenticated or identified by certificate.

The Court: Overruled, and may be admitted.

Mr. Springer: We except.

Witness dismissed.

Whereupon NATHANIEL PERRYMAN, being first duly sworn according to law, was called to the witness stand and testified as follows, to-wit:

Direct Examination of Nathaniel Perryman by Mr. Pounders:

Q. State your name? A. Nathaniel Perryman.

Q. You are the Nathaniel Perryman who is mentioned in this suit?

A. Yes, sir.

Q. As owner of certain lands involved? A. Yes, sir.

Q. Mr. Perryman, did you write Mr. Strain, assistant superintendent of the Five Civilized Tribes, a letter in relation to the purchase of that land? A. Yes, sir.

Q. In the year of 1918? A. Yes, sir.

Q. Did you keep a copy of that letter? A. No, sir.

The Court: Show him that copy and let him compare it and state whether or not that is a copy of it.

Q. I hand you plaintiff's exhibit 18 and will ask you to state whether or not you can say that is or that is not a photostatic copy of your letter? A. Yes, sir.

The Court: You wrote that in Sapulpa and mailed it?

A. Wrote it at Sapulpa.

The Court: And mailed it here to the assistant superintendent of the Five Civilized Tribes at Muskogee?

A. Yes, sir.

Mr. Pounders: We will offer in evidence exhibit 18.

The Court: Very well, you will have to follow that up and show it was mailed to Washington.

Mr. Springer: We object to that as being wholly immaterial and not properly authenticated and not identified and not the best evidence.

The Court: He says he wrote the letter and mailed it here to the assistant superintendent of the Five Civilized tribes and that is a copy. I will let you go that far.

Mr. Springer: We except.

Witness dismissed.

Whereupon Mr. JOE H. STRAIN was recalled for further direct examination.

Further Direct Examination of Mr. Strain by Mr. Pounders:

Q. Mr. Strain, are you familiar with the duties of the field clerks with reference to the purchase of lands and——

The Court: Ask him if he knows where the original of that letter was sent.

Mr. Pounders: The other exhibit—probably necessary to refresh his memory.

The Court: Very well.

Q. Restricted Indians, they have trust funds with the superintendent of the Five Civilized Tribes? A. Yes, sir.

Q. There is a field clerk method if making this purchase. Just state to the court just generally what method you proceed when you are following the field clerk method?

A. The allottees are instructed to appear before the field clerk and make their requisition and the field clerk recommends or disapproves the investment.

The Court: What is then done?

A. He forwards his conclusions to this office.

The Court: What office?

A. Superintendent of the Five Civilized Tribes, and it is assigned to my department to pass upon or act upon.

The Court: When you pass on or act on it, what is then done?

A. The title is examined to determine if the title is good and appraisement by the field clerk is either requested or sent in by the field clerk at the time of the request for investment. If the title is found to be good and appraisement justifies, at that time we usually request permission of the Commissioner of the Civilized Tribes——

The Court: What?

A. Commissioner of the Civilized Tribes to make the investment.

The Court: Who is Commissioner of the Civilized Tribes?

A. Commissioner of the Indian Affairs—excuse me—Commissioner of Indian Affairs, Cato Sells, to make the investment.

Q. Do you make such request for authority now?

A. We don't without it is an extreme case. If it is an extreme case, more or less technical, we do submit them once and awhile.

Q. Don't go to Washington for that kind of authority any more? A. No, sir, as a rule we do not.

Q. And plaintiff's exhibit 14, copy of letter signed by you to the Commissioner of Indian Affairs, and appears in reference to letter from field clerk Elden Lowe, inclosed, from reading that statement, can you now state whether or not there was a letter from Mr. Lowe which was forwarded or inclosed i nthat as a part of the report? A. Yes, sir.

Witness dismissed.

Mr. Pounders: Your honor, I will have to ask Mr. Burk to be sworn.

Whereupon Mr. E. J. BURKE was duly sworn according to law and was called to the witness stand and testified as follows:

Direct examinatoin of Mr. E. J. Burke by Mr. Pounders:

Q. Your name is E. J. Burke? A. Yes, sir.

Q. You are Chief of the field division, they call it?

A. Yes, sir.

Q. The field clerk's office under the Superintendent of the Five Civilized Tribes? A. Yes, sir.

Q. And as such you have an office here with the Superintendent? A. Yes, sir.

Q. Have you this morning examined the file in the Nathaniel Perryman matter in the Superintendent's office to find the originals of or duplicate copies of the letter of Mr. Lowe to Mr. Parker of date May 22, 1918? A. Yes, sir.

Q. And also of the appraisement of the land? A. Yes, sir.

Q. Of that date by Mr. Lowe? A. Yes, sir.

Q. Did you find such paper or copy? A. No, sir.

Q. Nothing there at all? A. No, sir.

Q. Mr. Burke, what is meant in the use of the word by your office talking and dealing back and forth with the Commissioner of Indian Affairs "Restricted form deed?"

Mr. Springer: We object as being incompetent, irrelevant and immaterial and heresay.

The Court: I will permit him to testify what is meant by the term "restricted form."

Mr. Springer: We except.

A. Some years ago a form of deed was adopted by the Secretary of the Interior in cases where property was being purchased for an Indian by name of Lacher from a man named Carney and that first case has always been known as the Carney-Lacher case and all cases of that kind known as Carney-Lacher form of deed.

Q. So when you use the restricted form of deed you refer to that Carney-Lacher form? A. Yes, sir.

The Court: And is that term used in the department and so understood?

A. Yes, sir.

Q. Generally used? A. Yes, sir, has been so termed, but usually call it restricted form of deed—only restricted form of deed the Secretary has ever approved.

Witness dismissed.

Whereupon, Mr. JOE H. STRAIN was recalled to the witness stand for further direct examination.

Further direct examination of Mr. Joe H. Strain by Mr. Pounders:

Q. Mr. Strain in the light of the testimony just submitted by Mr. Burke that he had made search of the office and cannot find the original or copy of letter by Mr. Lowe to Mr. Burke of date May 22, 1918, nor of the appraisement of that date, will you kindly examine exhibit 17 and state whether or not you ever saw the original of which that is a photostatic copy?

A. Yes, sir.

Q. Did you ever have custody of that original? A. I did.

Q. What did you do with them if anything?

A. Undoubtedly sent them to Washington, that is the custom.

The Court: When you send them to Washington, who do you send them to in Washington?

A. Commissioner of Indian Affairs.

Q. And look over exhibit 17 and can you now state what letter of the field clerk, Lowe, is referred to in exhibit 14 as being inclosed with that letter as of date June 28, 1918?

A. The letter of Mr. Lowe recommending the investment.

Q. And is this a copy of exhibit 17? A. Yes, sir.

Mr. Pounders: Plaintiff offers in evidence exhibit 17 and also exhibit 18, 17 being letter to Gabe Parker by Eldon Lowe, field clerk.

The Court: I will permit them on two theories—they are outside of this district being in the City of Washington. I think that this testimony, when they are not available, they could testify to this as a matter of fact and on the other theory they have become a part of the records of the Indian Affairs and that is an exemplified copy duly certified and I permit it for two reasons.

Mr. Springer: We except to the ruling of the court.

Mr. Pounders: Plaintiff rests. Do you want to ask Mr. Strain any questions?

Mr. Springer: I did.

Mr. Pounders: I beg your pardon.

Cross examination of Mr. Strain by Mr Springer:

Q. You say you are acquainted with the signature of Mr. C. P. Hauke? A. Yes, sir.

Q. Did you ever see him write his signature? A. I did not.

Q. You have no personal acquaintance with him?

A. None whatever.

Q. The only reason why you say you are well acquainted with his signature is from having received letters and telegrams from him acting in his official capacity and you acting in your official capacity, is that true? A. Yes, sir.

Q. Did you ever receive any order from the Secretary of the Interior relative to the relinquishment of restricted funds in your hands and for the investment of those restricted funds in the property in question here?

A. That usually comes from the Commissioner of Indian Affairs.

Q. I asked you the question from the Secretary of the Interior.

A. I could not be positive of that without referring to the files. I think though I have. I don't know in this case but I think I have.

Q. Did you ever receive any order from the Commissioner of Indian Affairs authorizing you to relinquish restricted funds belonging to Nathaniel Perryman and reinvesting those funds in the lands in controversy here?

A. I received an order to invest them but not relinquish them.

Q. Did not understand the answer.

The Court: He said he had received an order to invest them but not relinquish supervision.

A. Not to relinquish supervision.

Q. Now the order is this telegram you referred to here by exhibit 15? A. Yes, sir.

Q. That is the only order you ever received from the Commissioner of Indian Affairs?

A. Yes, I think so in regard to that specific case.

Q. Did you ever receive any order either from the Commissioner of Indian Affairs or the Secretary of the Interior under the seal of the Secretary of the Interior or Commissioner of Indian Affairs authorizing you to release restricted funds and reinvestment of those restricted funds in this particular property in dispute?

A. No, sir, I think not. That I think is the authority there.

Q. That is the only authority you have? A. Yes, sir.

Q. You say you think you have an order from the Secretary of the Interior relative to this matter?

A. In that case, no.

Q. What?

A. In this particular case, just a general proposition we have. Not this case.

Mr. Springer: That is all.

The Court: You say this order you are talking about by Assistant Commissioner of Indian Affairs that came in an envelope through the mails from Washington, D. C.

A. Yes, sir.

The Court: Stand aside.

Witness Dismissed.

Mr. Pounders: Plaintiff rests.

Mr. Springer: It is agreed that a portion of the original allotment to Nathaniel Perryman is still owned by him and that it is located at Tulsa, in Tulsa County, Oklahoma, and has been appraised at thirty thousand dollars by the Government. It is further agreed that the land involved in this action is worth ten thousand dollars.

Mr. Pounders: To which plaintiff objects as being immaterial and irrelevant.

The Court: I will permit it to go in the record.

Whereupon Mr. J. W. SUNDERLAND, having been first duly sworn according to law, was called to the witness stand and testified in his own behalf as follows, to-wit:

Direct examination of J. W. Sunderland by Mr. Springer:

Q. State your name, please. A. J. W. Sunderland.

Q. You are defendant in this action? A. Yes, sir.

Q. You purchased this piece of land from Nathaniel Perryman that is in dispute? A. Yes, sir.

Q. Mr. Sunderland before purchasing this land did you examine the records in the register of deeds office in Tulsa County, Oklahoma, to ascertain the title of this land?

Mr. Pounders: Object as being incompetent, irrelevant and immaterial.

The Court: I will permit him.

A. I had my attention——

Q. Did you examine it yourself?

A. Yes, sir, I did to the best of my knowledge.

Q. Did you find a record there in the office of the register of deeds office, County of Tulsa, of any order issued under the seal of the Secretary of Interior or Commissioner of Indian Affairs or anyone else imposing restrictions upon this piece of land?

Mr. Pounders: I object.

The Court: If they object to that, that will be a conclusion he is testifying to.

Q. In any affecting——

The Court: No, you can show him the deed that was recorded there and ask him if he saw that and he says yes and then ask him if he found any other paper connected with the deed. This other is a conclusion.

Q. Mr. Sunderland you may examine this exhibit 11 of the government and state if you found that deed recorded in register of deeds office in Tulsa County, Oklahoma?

A. Yes, sir, I did.

Q. Did you find recorded there any other order or instrument of any kind by either the Secretary of the Interior or the Commissioner of Indian Affairs? A. No, sir.

Mr. Springer: That is all. Take the witness.

The Court: You mean you found this deed with all acknowledgments and endorsements, that what you mean?

A. Yes, sir, just that, just as that is.

The Court: Very well, I will permit the evidence to go in the record.

Mr. Springer: That is all, defendants rests.

The Court: I will let it be submitted and taken under advisement and you can determine later whether you want to introduce any other evidence.

Plaintiff's Exhibit 1.

584 Homestead deed. (39) Creek Indian Roll, No. 2220.

The Muskogee (Creek) Nation, Indian Territory.

To all whom these presents shall come, greeting:

Whereas, by the Act of Congress, approved March 1, 1901, (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, shall be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, it was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, the said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Nathaniel Perryman, a citizen of said tribe, as a homestead.

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Nathaniel Perryman, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz.: The North West quarter of the North East quarter of Section Seven (7), Township Nineteen (19) North, and Range Thirteen (13) East, of the Indian Base and Meridian, in Indian Territory, containing Forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress, and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, devise, and descent of said land after the death of the said Nathaniel Perryman, subject, also to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 27th day of July, A. D. 1903.

(Seal) (Signed) P. Porter,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, LRS Approved Aug. 21, 1903.
(Signed) Ethan A. Hitchcock, Secretary,
By Oliver A. Phelps, Clerk.

.....Record on the 28th day of Aug., 1903, at 10 o'clock A. M.

Endorsed on back: Department of the Interior, Office of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Nathaniel Perryman, as the same appears of record in Book No. N, page 584 of Creek deed records.

(Seal) Jan. 3, 1921.
(Signed) Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Plaintiff's Exhibit 2.

Order Concerning Terms of Sale and Disposal of Proceeds, Allotted Lands, Five Civilized Tribes.

EK.

The United States Indian Superintendent,
Union Agency.

Sir: In the matter of the application of Nathaniel Perryman, Case No. 4668, a citizen of Creek Nation, Roll No. 2220, for the removal of restrictions upon certain described lands as covered by my order of even date herewith, you are hereby directed to cause this land to be sold under the sealed bid system, as provided by the Regulations of June 20, 1908, for cash.

You are hereby authorized to disburse from the proceeds of said sale, not to exceed the amounts indicated below; such disbursement to be made under the supervision of yourself and the District Agent for the benefit of the allottee:

Cash	Amount of Authority	Expenditures.
	$250.00	

Any residue, after the disbursement of the above amounts, to be deposited in the usual manner subject to the further orders of the Department.

If the total of the items authorized above exceeds the amount received from the sale, this authority must be modified before any disbursements are made except the cash payment to the allottee.

Department of the Interior, Washington, D. C. Sep. 29, 1910. (Signed) Frank Pierce,
First Assistant Secretary of the Interior.

Department of the Interior, U. S. Indian Service, Five Civilized Tribes.

I heheby certify that I am the officer having the care and custody of the records relating to the removal of restrictions on the alienation of allotments of members of the Five Civilized Tribes and that the above and foregoing is a true and correct copy of an order concerning terms of sale and disposal of proceeds, allotted lands, of Nathaniel Perryman, Roll No. 2220, a citizen of the Creek Nation.

Dated at Muskogee, Oklahoma, Jan. 7, 1921.

(Seal) (Signed) Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Plaintiff's Exhibit 3.

Department of the Interior
U. S. Indian Service, Five Civilized Tribes.

I hereby certify that I am the officer having the care and custody of the records relating to the removal of restrictions on the alienation of alotments of members of the Five Civilizzed Tribes and that the above and foregoing is a photographic copy of the order approved by the First Assistant Secretary of the Interior, Frank Pierce, removing the restrictions on the alienation of the land described therein, which land described as the

> West half of the Northwest quarter of the Northwest quarter of the Northeast quarter and the Southwest quarter of the Northwest quarter of the Northeast quarter of Section Seven, Township Nineteen North, Range Thirteen East of the Indian Base and Meridian, containing fifteen acres, more or less,

was sold to W. W. Fox, of Tulsa, Oklahoma, the deed therefor being executed by the allottee April 13, 1918, and delivered to the purchaser on April 29, 1918.

Dated at Muskogee this 4th day of January, A. D. 1921.

(Seal) (Signed) Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Order for Removal of Restrictions.

NL Department of the Interior.

Washington, D. C., Sep. 29, 1910.

Number 4668, Roll Number 2220 1/2 blood.

Whereas, Nathaniel Perryman, an allottee of the Creek Nation, has made application for the removal of restrictions from the following described land, to-wit:

West half (W/2) of Northwest quarter (NW/4) of Northeast quarter (NE/4) of Section Seven (7), Township Nineteen (19) North, Range Thirteen (13) East of the Indian Base and Meridian—containing 20 acres, more or less, located in Tulsa County.

Endorsed—"No Lease 5-6-18 CWS."

Now, therefore, I, under the authority vested in me by the Act of Congress approved May 27, 1908 (Public No. 140), and the regulations prescribed thereunder, hereby remove the restrictions from said above described lands, such removal of restrictions to become effective only and simultaneously with the execution of deed by said allottee to the purchaser after said land has been sold in compliance with the directions of the Secretary of the Interior.

(Signed) Frank Pierce,
First Assistant Secretary of the Interior.

(See other side for Superintendent's certificate.)

Endorsed on side—"$14,700—Lowe."

Department of the Interior, U. S. Indian Service, Five Civilized Tribes.

Muskogee, Oklahoma, April 29, 1918.

I hereby certify that the above and foregoing is a full, true and correct copy of a copy of the order of the honorable Secretary of the Interior, providing for the removal of restrictions upon the land described therein.

I further certify that, pursuant to the within and foregoing order, the land described therein as follows:

West half (W/2) of the Northwest quarter (NW/4) of The Northwest quarter (NW/4) of the Northeast quarter (NE/4) and the Southwest quarter (SW/4) of the Northwest quarter (NW/4) of the Northeast quarter (NE/4) of Section Seven (7), Township Nineteen (19) North, Range Thirteen (13) East of the Indian Base and Meridian, containing Fifteen (15) acres, more or less,

has been sold in compliance with the directions of the Secretary of the Interior, and that to make the sale effective, deed for said land from said allottee to W. W. Fox, of Tulsa, Oklahoma, the purchaser, was executed on April 13th, 1918.

(Signed) Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Plaintiff's Exhibit 4,

Asst.—Supt. J H S—E V B 6-28-18 Enclosures, In re proposed purchase for Nathaniel Perryman.

June 28, 1918.

The Honorable,
The Commissioner of Indian Affairs.

Dear Mr. Commissioner: Referring to your telegram of the 27th instant, in re proposed purchase by Nathaniel Perryman, beg leave to advise that this is a land sale account No. 4668, in which there is a balance of $13,661.05.

I am enclosing a letter from Field Clerk Lowe urging the immediate closing of the deal, in order to protect Mr. Perryman in losing a grain crop which is worth at least $500. Also, the appraisement by Mr. Lowe, showing that the land has a value of $10,150 which would indicate that Mr. Perryman is getting a bargain. We also enclose a letter from Mr. Perryman, urging us to close the deal for fear that he will lose the opportunity to purchase the same, owing to the development of oil and gas in the near vicinity.

We have asked the grantor to give us an opportunity to get the authority which was the urgent reason why we sent in a wire. The abstract has been passed upon by Title Examiner Merrick and title pronounced good.

The consideration agreed upon is $9,600 and we recommend the investment if same meets with your approval which kindly advise us by wire.

Very sincerely,

Acting Superintendent for the Five Civilized Tribes.

Macky, Day Muskogee, Oklahoma, June 24, 1918

Indian Commissioner, Washington.

Joe H. Strain, Acting Supt. Five Civilized Tribes.

Authority requested invest Nine Thousand Six Hundred Dollars Nathaniel Perryman, Perryman One Hundred Sixty acres appraised Ten Thousand Eight Hundred Fifty Dollars. Title good. If closed, immediately, get crop. Bargain. Land sale case four six six eight, authority September twenty-nine Ten.

(Signed) Strain

Department of the Interior,
U. S. Indian Service,
Five Civilized Tribes.

I, the officer in charge of the office of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, having the care and custody of the records thereof, do hereby certify

that the above and foregoing is a true and correct copy of letter dated June 28, 1918, and telegram dated June 24, 1918, to the Commissioner of Indian Affairs, Washington, D. C. pertaining to the purchase of land for Nathaniel Perryman.

Dated at Muskogee, Oklahoma, Jan. 7-1921.

(Seal) (Signed) Gabe E. Parker
Superintendent for the Five
Civilized Tribes.

Plaintiff's Exhibit 5.

Western Union Telegram

Received at 303 West Broadway, Muskogee, Oklahoma.

Washington, D. C. 558 P. M. July 2, 1918.

Parker Supt. 195 Muskogee, Oklahoma.

Referring your telegram and letter June Twenty Seventh and Twenty eighth respectively authority granted you invest on behalf Nathaniel Perryman Nine Thousand Six Hundred Dollars in purchase property therein described using restricted form of deed.

Hauke
Acting Asst. Commr. 534 P. M.

Stamped "Received July 3, 1918, No. 3437—Sup. Five Civilized Tribes."

Department of the Interior
U. S. Indian Service,
Five Civilized Tribes.

I, the officer in charge of the office of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, having the care and custody of the records thereof, do hereby certify that the above and foregoing is a true and correct copy of telegram dated July 2, 1918, from Hauke, Acting Assistant Commissioner of Indian Affairs, Washington, D. C., authorizing purchase of property for Nathaniel Perryman.

Dated at Muskogee, Oklahoma, Jan. 7-1921.

(Seal) (Signed) Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Plaintiff's Exhibit 6.

Warranty Deed — Special Form

This Indenture, made, executed and delivered this 24th day of June, 1918, by and between Grant R. McCullough and Clara E., his wife, and Lawrence K. Cone and Kate P. Cone,

his wife, parties of the first part, grantors, and Nathaniel Perryman party of the second part, grantee, Witnesseth:

That for and in consideration of the sum of Nine Thousand Six Hundred and no/100 Dollars ($9,600.00), to in hand paid, the receipt whereof is hereby acknowledged, from Nathaniel Perryman, the same being funds held by the United States in trust, subject to disbursement under the supervision of the secretary of the interior derived from the sale of restricted land have granted, bargained, sold and conveyed unto the said Nathaniel Perryman grantee, and by these presents do hereby grant, bargain, sell and convey unto the said Nathaniel Perryman, grantee the following described real property and premises situated in Tulsa County, State of Oklahoma, to-wit:

The South East quarter (S E ¼) of section Eight (8) Township Sixteen (16) North, Range Thirteen (13) East, containing One Hundred and Sixty (160) acres more or less according to government survey (revenue stamps $6.) Except oil and gas lease

together with all the improvements thereon, and appurtenances thereunto belonging, and warrant the title to the same.

To Have and To Hold said described premises, unto the said grantee, his heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title therto, executed during the life time of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification unless made with the consent of and approved by the Secretary of the Interior.

Signed and delivered on the day and date first above mentioned.

(Signed) Grant R. McCullough
(Signed) Clara E. McCullough
(Signed) Lawrence K. Cone
Witnesses: (Signed) Kate P. Cone.

Stamped — Received Office of Field Clerk Five Civilized Tribes Aug 16, 1918, Sapulpa, Oklahoma.

Stamped — Office of Indian Affairs Received Mar 11, 1919, 21514.

Stamped — Miscellaneous Received Aug 17, 1918, Encl to 67811.

Written across face — "268".

Acknowledgment.

The State of Oklahoma, Tulsa County, ss.

Before me, M. Hansel, a Notary Public, in and for said County and State, on this 24th day of June, 1918, personally appeared Grant R. McCullough and Clara E. McCullough, his wife; Lawrence K. Cone and Kate P. Cone, his wife to me known to be the identical persons who executed the within and foregoing instrument in my presence and both of said grantors acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal, the day and year above set forth.

(Signed) M. Hansel
(Seal) Notary Public.

My commission expires Sept. 10th, 1921.

Certificate of Notice.

Department of the Interior,
United States Indian Service,
Five Civilized Tribes,

Muskogee, Oklahoma. June 24, 1918.

I hereby certify that the land described in the above deed was purchased from the said Nathaniel Perryman with funds held in trust by the United States for his benefit derived from the sale of land allotted to him, by virtue of his enrollment as a ½ blood citizen of the Creek Nation, opposite No. 2220 on the final approval rolls of citizens by blood of that Nation, and that said purchase was made and said deed was executed, and the same is hereby approved pursuant to the Act of Congress of May 27, 1908, which authorized the Secretary of the Interior to remove restrictions from lands of the Five Civilized Tribes, "wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

(Signed) Joe H. Strain,
Acting Superintendent for the Five Civilized Tribes.

Compared 115684 Warranty Deed Special Form Grant R. McCullough et al., to Nathaniel Perryman 1:25

Stamped — State of Okla., Tulsa County, Tulsa, Okla.

I hereby certify that this instrument was filed for record in my office at 11 o'clock A. M. on Jul 6, 1918, and duly recorded in Record 250, page 92. Lewis Cline, County Clerk. O. G. Weaver, Deputy,

When recorded return to Eldon Lowe at Sapulpa, Okla. 8-16-13.

Department of the Interior
U. S. Indian Service Five Civilized Tribes.

I, the officer in charge of the office of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, having the care and custody of the records thereof, do hereby certify that the above and foregoing is a true and correct copy of Special Form Warranty Deed—dated June 24th, 1918, Nathaniel Perryman, grantee, Grant R. McCullough and Clara E., his wife, and Lawrence K. Cone and Kate P. Cone, his wife, grantors.

(Signed) Gabe E. Parker,
(Seal) Superintendent for the Five Civilized Tribes.
Dated at Muskogee, Oklahoma, Jan. 7-1921.

Plaintiff's Exhibit 7.

I hereby certify that I am the officer having the care and custody of the records relating to the removal of the restrictions and sale of land and disposal of the proceeds therefrom of members of the Five Civilized Tribes, and that the attached sheets, numbered one to seven, inclusive, are photostatic copies of the special instructions issued by the First Assistant Secretary of the Interior for the purchase of land for citizens of the Five Civilized Tribes with funds held in trust for their benefit.

Dated at Muskogee, Oklahoma, this 5th day of January, 1921.

(Seal) (Signed) Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

CAS. Department of the Interior, J.W.H.
Washington. Aug. 5, 1912.

Mr. Dana H. Kelsey,
Superintendent, Union Agency,
Muskogee, Oklahoma.

Sir: The Department has considered your letter of June 26, 1912, and deed transmitted therewith executed by Reuben and Eliza Carney, conveying to Salina Lacher, nee Underwood, certain lands situated in Johnson County, Oklahoma.

This deed was submitted for the inspection of this office that it might be determined whether it was properly prepared in accordance with the instructions of May 7, 1912, relating to the Emma McIntosh case.

By reference to your previous letter relating to this case, which was approved May 25, 1912, I find that authority was given for the use of the sum of $1400 for the purchase of land

for this allottee. That sum was reported to be the amount for which the land could be purchased, and it did not appear that any other consideration was to be paid for it. On this account, I prefer that the words, "and other good and valuable considerations" be omitted from the deed, so that it will not appear upon the face of the instrument that the consideration included any funds except those held in trust by the United States.

I deem it advisable also that it shall appear in the deed that the funds used to purchase this land were derived from the sale of allotted Indian land. With these ideas in mind, the granting clause in this case should read as follows:

> "Witnesseth, that for and in consideration of the sum of One Thousand Four Hundred Dollars ($1,400.00), to us in hand paid, the receipt whereof is hereby acknowledged, from the proceeds of the sale of restricted lands allotted to the said Salina Lacher, nee Underwood, as a full-blood Chickasaw, the same being funds held by the United States in trust, subject to disbursement under the supervision of the Secretary of the Interior, we, Reuben Carney and Eliza Carney, husband and wife, have granted, bargained, * * *," etc.

I note that in the form submitted by you the condition against alienation was made as "one of the mutual considerations" for the conveyance. Instead of following this form, it will be preferable, in my opinion, to have the concluding paragraph of the deed read as follows:

> "To have and to hold said described premises, unto the said grantee, her heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior or his successor in office."

It will be unnecessary for the deed, if drafted as herein suggested, to be signed by the grantee.

My original instructions were that the certificate of notice, which I intended should be indorsed at the foot of the deed, and be recorded as a part thereof, should be executed in this office. I have concluded, however, that the purpose of the notice will be accomplished just as effectively if the deed be approved and the certificate signed by you acting upon authority previously granted by the Department. It is therefore

directed that you execute the certificate and approve the deed, using the following form:

"Certificate of Notice.

"Department of the Interior, United States Indian Service, Union Agency, Muskogee, Oklahoma.

....., 1912.

"I hereby certify that the land described in the above deed was purchased for Salina Lacher, nee Underwood, with funds *derived from the sale of lands allotted to her as a full-blood Chickasaw Indian by virtue of her enrollment opposite No. 2813* on the final approved rolls of citizens by blood of that nation, and that said purchase was made and said deed executed, and the same is hereby approved, pursuant to the Act of Congress of May 27, 1908, which authorized the Secretary of the Interior to remove restrictions from allotted lands of the Five Civilized Tribes 'WHOLLY OR IN PART, under such rules and regulations concerning TERMS OF SALE AND DISPOSAL OF THE PROCEEDS for the benefit of the respective Indians as he may prescribe.'

.....,

U. S. Indian Superintendent."

For your convenient reference, I inclose copy of proposed form prepared in accordance herewith, together with all other papers relating to the matter.

Respectfully,

(Signed) Samuel Adams,
First Assistant Secretary.

Inclosures. MP JWH

Stamped on face—Received Aug. 7, 1912, Union Agency. Dept. No. 2450.

Warranty deed.

This Indenture, made, executed and delivered this ... day of ....., 1912, by and between Reuben Carney, full-blood Chickasaw, Roll Number 886, and Eliza Carney, husband and wife, parties of the first part, grantors, and Salina Lacher, nee Underwood, a full-blood Chickasaw, Roll Number 2813, party of the second part, grantee, witnesseth:

That for and in consideration of the sum of One Thousand Four Hundred Dollars ($1,400.00), to us in hand paid, the receipt whereof is hereby acknowledged, from the proceeds of the sale of restricted lands allotted to the said Salina Lacher, nee Underwood, as a full-blood Chickasaw, the same being funds held by the United States in trust, subject to disbursement under the supervision of the Secretary of the In-

terior, we, Reuben Carney and Eliza Carney, husband and wife, have granted, bargained, sold and conveyed unto the said Salina Lacher, nee Underwood, grantee, and by these presents do hereby grant, bargain, sell and convey unto the said Salina Lacher, nee Underwood, grantee, the following described real property and premises, situated in Johnson County, State of Oklahoma, to-wit:

(Insert description of property.)

together with all the improvements thereon and appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises, unto the said grantee, her heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior or his successor in office.

Signed and delivered on the day and date first above mentioned.

Witnesses: .....
.....
.....

Stamped—Received Aug. 7, 1912, Union Agency. Dept. No. 2450.

Department of the Interior.
Office of the Secretary.

Notice is hereby given that, pursuant to the Act of Congress approved May 27, 1908, and the Rules and Regulations prescribed thereunder, the lands described herein have been purchased with trust funds for said grantee under my directions, and this conveyance is hereby approved.

First Assistant Secretary of the Interior.
H.

Stamped—Received Union Agency Aug. 7, 1912. Enclosure to Dept. 2450.

Copy.

Secretary's Office, Department of the Interior,
Washington, D. C.

CAS 108A J. W. H.
January 23, 1913.

Mr. Dana H. Kelsey,
Superintendent Union Agency,
Muskogee, Okla.

Sir: The Department has considered your letter of January 4, 1913, recommending form of certificate to be appended to deeds to Indians of the Five Civilized Tribes where the purchase price is to be paid from funds due them in lieu of allotments.

I do not deem it advisable or necessary to refer to the Act of April 26, 1906, in this certificate, inasmuch as that Act is not primarily an authority for the use of such funds in the manner indicated.

Where lands are purchased for Indians of the restricted class with funds due them in lieu of allotments, and it is intended to give them protection equal to that enjoyed by those Indians who actually received allotments, I desire that the following form of certificate be used. I deem it important that the trust nature or the funds referred to therein shall be evidenced by official authority, and that the degree of Indian blood of the owner of those funds shall be clearly stated, so that all who may thereafter deal or attempt to deal in the land described in the deed shall be placed unmistakably upon notice. To this end certain words in the form should be capitalized when printed, in accordance with the following form:

> I hereby certify that the land described in the above deed was purchased for the said ..... with funds HELD IN TRUST by the United States for his (or her) benefit due him (or her) in lieu of an allotment by virtue of his (or her) enrollment as a ..... blood..... opposite No. ..... on the final approved rolls of citizens by blood of that nation, and that said purchase was made and said deed executed and the same is hereby approved pursuant to the orders of the Secretary of the Interior.

I think it would also be well to modify the form of deed submitted by you by omitting from the last paragraph the words "or his successor in office."

Respectfully,

(Signed) Samuel Adams,
First Assistant Secretary.

Copy hereof with copy of Supt's letter of January 4, 1913, to Indian Office. All other papers retained in Department.

(Insert Acknowledgment.)

Certificate of Notice.

Department of the Interior, United States Indian Service,
Union Agency, Muskogee, Oklahoma.
....., 1912.

I hereby certify that the land described in the above deed was purchased for Salina Lacher, nee Underwood, with funds derived from the sale of lands allotted to her as a full-blood Chickasaw Indian by virtue of her enrollment opposite No. 2813 on the final approved rolls of citizens by blood of that nation, and that said purchase was made and said deed executed, and the same is hereby approved, pursuant to the Act of Congress of May 27, 1908, which authorized the Secretary of the Interior to remove restrictions from allotted lands of the Five Civilized Tribes "WHOLLY OR IN PART, under such rules and regulations concerning TERMS OF SALE AND DISPOSAL OF THE PROCEEDS for the benefit of the respective Indians as he may prescribe."

.....

U. S. Indian Superintendent.

Stamped—Received Union Agency Aug. 7, 1912. Enclosure to Dept. No. 2450.

(Plaintiff's Exhibit 8.)

Asst. Supt. JHS-EVB 6-28-18. Enclosures In re proposed purchase for Nathaniel Perryman. June 28, 1918.

The Honorable
The Commissioner of Indian Affairs.

Dear Mr. Commissioner: Referring to your telegram of the 27th instant, in re proposed purchase by Nathaniel Perryman, beg leave to advise that this is a land sale account No. 4668, in which there is a balance of $13,661.05.

I am enclosing a letter from Field Clerk Lowe urging the immediate closing of the deal, in order to protect Mr. Perryman in losing a grain crop which is worth at least $500. Also, the appraisement by Mr. Lowe, showing that the land has a value of $10,150 which would indicate that Mr. Perryman is getting a bargain. We also enclose a letter from Mr. Perryman, urging us to close the deal for fear that he will lose the opportunity to purchase the same, owing to the development of oil and gas in the near vicinity.

We have asked the grantor to give us an opportunity to get the authority which was the urgent reason why we sent in a wire. The abstract has been passed upon by Title Examiner Merrick and title pronounced good.

The consideration agreed upon is $9,600 and we recommend the investment if same meets with your approval, which kindly advise us by wire.

Very sincerely,

(Signed) Joe H. Strain,
Acting Superintendent for Five Civilized Tribes.

(Plaintiff's Exhibit 9.)

Western Union Telegram.

Received at 303 West Broadway, Muskogee, Oklahoma.

161KMST 43 Govt
195 W A Washington D C 558 P M July 2 1918

Parker Supt
Muskogee Okla

Referring your telegram and letter June twenty seventh and twenty eighth respectively authority granted you invest on behalf Nathaniel Perryman Nine Thousand Six Hundred Dollars in purchase of property therein described using restricted former deed. Hauke
534 PM Acting Asst Commr

Stamped—Department received July 3, 1918, No. 3437 Supt. Five Civilized Tribes.

(Plaintiff's Exhibit 10.)

United States of America, Treasury Department.

January 8, 1921.

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed photographic copies of checks #8681 and #9146 issued in favor Nathaniel Perryman, by D. Buddruss, symbol #63549 for $9601.25 and $3015.00, respectively, are true copies of the original checks on file, in the Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

(Signed) S. O. Gilbert, Jr.,
(Seal) Assistant Secretary of the Treasury,
Brown

GFH Treasury Department Chief Clerk and Superintendent

Form 66. Ed 5,000 - Jan. 31-19. E. J. J.

Countersigned:
Interior.
Indian Muskogee, Okla., July 9, 1918. 9146
Joe H. Strain,
Acting Superintendent for the Five Civilized Tribes. FNT

Treasurer of the United States 15-51

(Seal) Pay to the order of Nathaniel Perryman $3015.00.
Three Thousand Fifteen Dollars.

Vo. No (Roll No. CR-2220 for identification only)

object for which drawn Ind. Ind. Moneys Class A.
(Signed) D. Buddruss
Cashier and Disbursing Agent. 63549

Form approved Comptroller of the Treasury January 27, 1913.

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the same must be spelled exactly the same as it is on the face of the check.

If payee is unable to write, his indorsement must be a clear, distinct impression of his right thumb (or of left in case of loss of right) after his name. Indorsement to be witnessed by two reputable persons who can write; their names to be followed by addresses and occupations. Whenever possible one of the witnesses must be an employee of the Government or a member of the Indian's tribe.

Pay to the order of

(Written) L. McKerracher
(Signed) Nathaniel Perryman.
Sign on this line.

Stamped—Pay First National Bank Tulsa, Okla. or order prior endorsement guaranteed Bank of Mounds Okla. G. A. Morriss, Cashier.

Stamped—Pay Federal Reserve Bank of Chicago or order, prior endorsement guaranteed Oct. 13, 1918, Continental and Commercial National Bank of Chicago W. W. ...., Cashier. Stamped — Received Payment from the Treasurer of the United States Oct. 19, 1918, Federal Reserve Bank of Chicago 2-30.

Countersigned
Interior
Indian Muskogee, Okla., Jul. 3, 1918. 8681
.....
Superintendent for the Five Civilized Tribes FNT
Treasurer of the United States 15-51

(Seal) Pay to the order of Nathaniel Perryman $9601.25
Ninety Six Hundred One 25/100 Dollars.

Object for which drawn Ind. Ind. Moneys Vol. No.
Class A (Roll No. CR-2220 for identification only) 63549
(Signed) D. Buddrus,
Cashier and Special Disbu. Agent.

Stamped—First National Bank, Tulsa, Okla., Jul. 6, 1918, Teller No. 2.

Form approved by the Comptroller of the Treasury, January 27, 1913.

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If payee is unable to write, his indorsement must be a clear, distinct impression of his right thumb (or of left in case of loss of right) after his name. Indorsement to be witnessed by two reputable persons who can write; their names to be followed by addresses and occupations. Whenever possible one of the witnesses must be an employee of the Government or a member of the Indian's tribe.

Pay to the order of

(Written) L. K. Cone and G. R. McCullough
(Signed) Nathaniel Perryman
Sign on this line.

(Signed) L. K. Cone
(Signed) G. R. McCullough

Stamped—pay Any Bank or Banker or order prior endorsement guaranteed Jul 6, 1918, First National Bank, Tulsa. Okla. Roscoe Adams, Cashier.

Stamped — * * * Jul 8, 1918, The Mechanics and * * * Bank * *

(Plaintiff's Exhibit 11).

This Indenture, made, executed and delivered this 24th day of June 1918, by and between Grant R. McCullough and Clara E., his wife, and Lawrence K. Cone and Kate P. Cone, his wife, parties of the first part, grantors, and Nathaniel Perryman, party of the second part, grantee, Witnesseth:

That for and in consideration of the sum of Nine Thousand Six Hundred and No/100 Dollars ($9,600.00), to .... in hand paid, the receipt whereof is hereby acknowledged from Nathaniel Perryman the same being funds held by the United States in trust, subject to disbursement under the supervision of the Secretary of the Interior derived from the sale of restricted land have granted, bargained, sold and conveyed unto the said Nathaniel Perryman grantee, and by these presents do hereby grant, bargain, sell and convey unto the said Nathaniel Perryman, grantee the following described real property and premises situated in Tulsa County, State of Oklahoma, to-wit:

The South East Quarter (S E ¼) of Section Eight (8) Township Sixteen (16) North, Range Thirteen (13) East, containing One Hundred and Sixty (160) acres more or less according to government survey

Cancelled revenue stamps $6.

Except oil and gas lease

together with all the improvements thereon, and appurtenances thereunto belonging, and warrant the title to the same.

To Have and To Hold said described premises, unto the said grantee his heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior.

Signed and delivered on the day and date first above mentioned.

Stamped — Miscellaneous Received Aug 17, 1918, Encl to No. 67811. Supt. Five Civilized Tribes.

(Signed) Grant R. McCullough,
(Signed) Clara E. McCullough,
(Signed) Lawrence K. Cone,
(Seal) (Signed) Kate P. Cone.

Witnesses:

Stamped — Received Office of Field Clerk Five Civilized Tribes Aug 16, 1918, Sapulpa, Okla.

Stamped — Office of Indian Affairs received Mar 11, 1919, 21514.

Stamped — Department received Mar 26, 1919, Encl. to No. 1541 Supt. Five Civilized Tribes.

Acknowledgment.

The State of Oklahoma, Tulsa County, ss.

Before me, M. Hansel, a Notary Public, in and for said County and State, on this 24th day of June, 1918, personally appeared Grant R. McCullough and Clara E. McCullough, his wife; Lawrence K. Cone and Kate P. Cone, his wife to me known to be the identical persons who executed the within and foregoing instrument in my presence and both of said grantors acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal, the day and year above set forth. (Signed) M. Hansel, Notary Public. (Seal) My commission expires Sept. 10th, 1921.

Certificate of Notice

Department of the Interior, United States Indian Service, Five Civilized Tribes, Muskogee, Oklahoma.

June 24, 1918.

I hereby certify that the land described in the above deed was purchased for the said Nathaniel Perryman with funds held in trust by the United States for his benefit derived from the sale of land allotted to him by virtue of his enrollment as a ½ blood citizen of the Creek Nation, opposite No. 2220 on the final approved rolls of citizens by blood of that Nation, and that said purchase was made and said deed was executed, and the same is hereby approved pursuant to the Act of Congress of May 27, 1908, which authorized the Secretary of the Interior to remove restrictions from lands of the Five Civilized Tribes, "wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

(Signed) Joe H. Strain,
Acting Superintendent for the Five Civilized Tribes.

115674 Compared Warranty Deed Special Form. Grant R. McCullough, et al., to Nathaniel Perryman 1.25. State of Oklahoma, Tulsa County, Tulsa, Okla. I hereby certify that this instrument was filed for record in my office at 11 o'clock A. M., on Jul. 6, 1918, and duly recorded in 250, page 92. Lewis Cline, County Clerk, O. G. Weaver, Deputy. When recorded return to Eldon Lowe, at Sapulpa, Okla. 8-16-13.

(Plaintiff's Exhibit 12)

124817

Warranty Deed.

This indenture, made this 20th day of February, A. D. 1919, between Nathaniel Perryman of Tulsa County, in the State of Oklahoma, of the first part, and Fannie Perryman, the second part.

Witnesseth: That in consideration of the sum of One Dollar and love and affection the receipt whereof is hereby acknowledged, said party of the first part does, by these presents, grant, bargain, sell and convey unto said party of the second part, her heirs and assigns, all of the following described real estate, situated in the County of Tulsa, State of Oklahoma, to-wit:

The North Half (N ½) of the Southeast Quarter (S E ¼) of Section Eight (8), Township Sixteen (16) North, Range Thirteen (13) East, in Tulsa County, Oklahoma.

To Have and To Hold the Same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, forever.

And said Nathaniel Perryman his heirs, executors or administrators does hereby covenant, promise and agree to and with said party of the second part, at the delivery of these presents that he is lawfully seized in his own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all singular the above granted and described premises with the appurtenances; that the same are free, clear, and discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes and assessments and incumbrances of whatever nature and kind and that he will warrant and forever defend the same unto the said party of the second part, her heirs and assigns, against said party of the first part, his heirs and assigns, and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof, the said party of the first part has hereunto set his hand the day and year first above written.

(Signed) Nathaniel Perryman.

State of Oklahoma, Tulsa County, ss.

Before me, Josephine Ball, a notary public in and for said county and state, on this 25th day of February, 1919, personally appeared Nathaniel Perryman, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above written. (Signed) Josephine Ball. (Seal) My commission expires August 28, 1922.

State of Oklahoma, Tulsa County, ss.

Filed for record the 20th day of February, 1919, at 2 o'clock P. M. (Seal) Lewis Cline, Co. Clerk, O. G. Weaver, Deputy.

Endorsed on back—State of Oklahoma, County of Tulsa, ss. I, O. D. Lawson, County Clerk, in and for the county and state above named, do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office and recorded in book 269, page 559. Dated the 11 day of Jan., 1921. O. D. Lawson, County Clerk. Chas. Haley, Deputy (Seal).

(Plaintiff's Exhibit 13.)

Restrictions. Nathaniel Perryman, Creek—2220 TUS—8681—$9601.25.

Sapulpa, Okla., July 6, 1918. Received of Eldon Lowe, check described on the margin hereof, in payment for article or purpose mentioned. (Signed) L. K. Cone & G. R. McCullough, by Russ L. Grant, Agt. (This receipt when signed, to be returned promptly for the files of the office of Superintendent for the Five Civilized Tribes.)

Stamped—Received Supt. for Tribes, Jul. 8, 1918. No.

(Plaintiff's Exhibit 14.)

Department of the Interior, Office of Indian Affairs.

Washington, Jan. 25, 1921.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers thereto attached are true copies of the originals as the same appear on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal) (Signed) E. B. Meritt,
Assistant Commissioner.

Department of the Interior.
United States Indian Service.

Make all remittances payable to M. M. Baker, Cashier.
(Seal Five Civilized Tribes)

Gabe E. Parker, Superintendent. Asst. Supt. JHS-EVB 6-28-18. Enclosures In re proposed purchase for Nathaniel Perryman.

Muskogee, Oklahoma, June 28, 1918.

The Honorable,
The Commissioner of Indian Affairs.

Dear Mr. Commissioner: Referring to your telegram of the 27th inst, in re proposed purchase by Nathaniel Perryman, beg leave to advise that this is a land sale account No. 4668, in which there is a balance of $13,661.05.

I am enclosing a letter from Field Clerk Lowe urging the immediate closing of the deal, in order to protect Mr. Perryman in losing a grain crop which is worth at least $500. Also, the appraisement by Mr. Lowe, showing that the land has a value of $10,150 which would indicate that Mr. Perryman is getting a bargain. We also enclose a letter from Mr. Perryman, urging us to close the deal for fear that he will lose the

opportunity to purchase the same, owing to the development of oil and gas in the near vicinity.

We have asked the grantor to give us an opportunity to get the authority which was the urgent reason why we sent in a wire. The abstract has been passed upon by Title Examiner Merrick and title pronounced good.

The consideration agreed upon is $9,600 and we recommend the investment if same meets with your approval, which kindly advise us by wire.

Very sincerely,

(Signed) Joe H. Strain,
Acting Superintendent for the Five Civilized Tribes.

(Plaintiff's Exhibit 15.)

Confirmation copy of official telegram.

Department of the Interior, Office of Indian Affairs.

Washington, D. C. July 2, 1918.

Western Union Telegraph Co. Day

To Parker, Supt.,
Muskogee, Oklahoma.

Referring your telegram and letter June twenty-seventh and twenty-eighth, respectively, authority granted you invest on behalf Nathaniel Perryman nine thousand six hundred dollars in purchase property therein described, using restricted form of deed

(Stamped) C. P. Hauke,
Acting Assistant Commissioner.

Land—F. T. 52766-18-55315-18 V W R

Stamped—Department Received Jul. 8, 1918, No. 3511, Supt. Five Civilized Tribes.

Written on face—Asst. Supt. 7-3-18.

(Plaintiff's Exhibit 16.)

Department of the Interior, Office of Indian Affairs.

Washington, Jan. 25, 1921.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears of record in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed on the day and year first above written.

(Seal)

(Signed) E. B. Meritt,
Assistant Commissioner.

Western Union Day

July 2, 1918.

Parker, Supt.
Muskogee, Oklahoma.

Referring your telegram and letter June twenty-seventh and twenty-eighth, respectively, authority granted you invest on behalf of Nathaniel Perryman nine thousand six hundred dollars in purchase property therein described, using restricted form of deed.

(Stamped) C. P. Hauke,
Acting Assistant Commissioner.
CPH JWH M.

Land—F. T. 52766-18 55315-18 V W R HO
Initialing copy—for file.

(Plaintiff's Exhibit 17.)

Department of the Interior, Office of Indian Affairs.

Washington, Jan. 25, 1921.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal) (Signed) E. B. Meritt,
Assistant Commissioner.

Department of the Interior.
United States Indian Service.
Local Field Representative.
(Seal Five Civilized Tribes.)

Restrictions, Nathaniel Perryman.

Sapulpa, Oklahoma, 5/23/18.

Hon. Gabe E. Parker,
Superintendent Five Civilized Tribes,
Muskogee, Okla.

Dear Mr. Parker: Enclosed please find appraisement of tract of land supposed to be purchased for Nathaniel Perryman.

The land has been selected by Mr. Perryman for his home, a letter is now on file with you stating that the allottee desired to purchase a farm for his home. A small tract of the allottee's land was sold for the purpose of starting him in the farming business and get him out of town and away from bad associates.

Adjoining this tract is a fine new brick school house, being erected, giving the allottee's children a fine opportunity for schooling.

It is desired that prompt action be taken on this proposition in order that the allottee can secure the benefit of the grain rent that is carried with the transfer of the land. The grain rent that the allottee will receive, should the deal be closed before the grain is harvested, is estimated by Government Farmer Crouse to be $500.00.

It is my recommendation that the purchase be made under restricted form of deed at the very earliest time possible.

Sincerely yours,

(Signed) Eldon Lowe,
Field Clerk.

The purchase price of that tract is $9600.00. Names of owners, L. K. Cone and G. R. McCullough.

(Signed) Eldon Lowe.

Stamped—Miscellaneous. Received May 23, 1918. No. 45341. Five Civilized Tribes.

Stamped—Office of Indian Affairs. Received Jul. 1, 1918, 55315.

Department of the Interior, United States Indian Service.
Office of Field Clerk.

Case No.....

Sapulpa, Okla., May 23/18.

Mr. .....

Land Appraiser,

....., Okla.

Sir: Please appraise folowing described land for the purposes:

(a) Joint appraisement of allotted land to be offered for sale.

Desired not later than ....., 191...

(b) Inherited land showing value and condition of following date ....., 191...

Desired not later than....., 191...

(c) County Court in the case of .....

Required not later than ....., 191...

Remarks: .....

Owners—L. K. Cone and Grant R. McCullough.

Description .....

SE¼ Section Eight, Township 16 N., Range 13 E., containing 160 acres in Tulsa County, Okahoma. .....

Respectfully,

Field Clerk.

Stamped—Miscellaneous. Received May 23, 1918. No. 45341. Five Civilized Tribes.

Stamped—Office of Indian Affairs. Received Jul. 1, 1918, 55315.

The land above described is 7 miles from the town of Bixby, 5 miles from Mounds, Oklahoma, which has approximately 1,000 population, and is now held in possession by J. N. Tuttle, who claims to be the tenant of L. K. Cone and G. R. McCullough, Tulsa, Oklahoma ——— If by tenant, state name and post-office of person from whom he claims to rent said land.

If occupant is in possession under an illegal deed or under a lease or deed from a grantee holding an illegal deed, separate attached report should be made as to how long the allottee has been out of possession of land and how much the different persons connected with the transaction should pay the allottee for the use of the land while they have had possession. Also description and value of improvements made by occupants.

Character of Land.

Acres smooth 160. Number of acres tillable 160.
Acres rolling, free from rock—none.
Acres hilly and rocky, none.
Acres bottom land, none. Number of acres in cultivation, 130.
Acres overflow, none.
Acres grass land, 30. Kind of soil, black sandy loam.
Acres Johnson grass, none.
Acres merchantable timber, none.
Acres sold ..... Number of oil or gas wells on land—1 small gas; 2 wells plugged.
Acres unsold .....
Acres scrub timber, none. Oil and gas wells adjoining land, 2.
Acres farm timber .....
Acres timber land which may be cultivated now, none. Nearest oil or gas well in vicinity, 1/4 mile.
Acres timber land which may be cleared and cultivated, none. Average producton, small 1/2 M.
If timber sold, was same moved at date of appraisement, or date of deed, if an inherited case?
Number of draws injuring land, none.
Gulches, none.
Creeks, none.

Improvements.

2 Room (frame, box or log) box house, value 14/32 $250.00
2 Room (frame, box or log) box house, value.... 50.00

1 Barn of the value of & sheds..... 100.00
1 Granary of the value of..... 100.00
1 Stock tank..... 100.00
1 Cistern (bored or dug) 16 ft. deep, of the value of 100.00
160 Rods of 3-w fencing of the value of..... 100.00
160 rods poor fencing..... 50.00
Orchard of ..... fruit trees of the value of
130 Acres in cultivation of the value of.....7800.00
30 Acres of the value of.....1500.00
..... of the value of
..... of the value of
..... of the value of
..... of the value of
..... of the value of
Value of land exclusive of improvements, and not considering townsite or gas or mineral value .....
Value of unsold timber..... .....
Value of shale, stone, coal or other mineral..... .....
Additional value for townsite purposes ....
Additional value for oil and gas mining purposes .....
Total appraised value $10,150.00

General Remarks.

Is there any reason why this land should not be sold? The house on this tract is supplied with gas from well located thereon. There being 80 rods of 1 1/4 gas pipe connecting house with well.

I hereby certify that I have personally visited the above described tract of land and appraised same, and have fixed the last above mentioned sum for the total appraised value, including improvements, as a fair, reasonable and adequate consideration for said land on May 22, 1918.

(Signed) ..... Appraiser.

I concur: Eldon Lowe, Field Clerk.
Sapulpa, Okla., May 22, 1918.
Dawes Commission equalization. Appraisement $.....

(Plaintiff's Exhibit 18.)

Department of the Interior, Office of Indian Affairs.

Washington, Jan. 25, 1921.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my

name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal) (Signed) E. B. Meritt,
O'N. Assistant Commissioner.

Sapulpa, Okla., May 24, 1918.

Mr. Joseph Strain,
Asst. Supt. of the Five Civ. Tribes,
Muskogee, Okla.

Dear Sir: I have a favor to ask of you and it is important to me as I am living without a home and wish to buy the farm near Mounds as soon as possible as they are drilling a well about two hundred feet from the line of this farm and if it comes in they will not sell me the land and it does not come in I will buy it any way and I wish you will rush it through before this well is drilled in which will be in a few days.

It gives the owners the advantage of me and I am looking to you for protection and I have lived out in a very bad old torn down house and it is a great hardship on my family and they are sick.

You can see that if the buying is delayed very long I will be liable to loose the farm and it will be much more valuable now as they have the refusal as it is and the crop will be harvested soon and grain will be lost to me also.

Sincerely yours,

(Signed) Nathaniel Perryman.

Stamped—Office of Indian Affairs. Received Jul. 1, 1918. 55315.

The above and foregoing constitutes all of the oral testimony and also all of the exhibits offered or introduced at the trial of said cause by either party hereto.

The foregoing statement of the evidence in this cause is hereby approved and the clerk of this court is hereby ordered to file the same and when the same is filed, it shall constitute and be a part of the records in this case.

Dated this the 24th day of May, 1922.

R. L. WILLIAMS, Judge.

The foregoing is a true copy of evidence taken by stenographer upon trial.

O. H. GRAVES,
Spl. Asst. U. S. Atty.

Filed May 24, 1922. W. V. McClure, Clerk U. S. District Court.

Petition for Appeal.

Petition for appeal to the Hon. R. L. Williams, sitting as judge and trying the above entitled cause of action, greeting:

The defendant above named, J. W. Sunderland, feeling himself aggrieved by the decree made and entered in this cause on the 2nd day of January, A. D. 1922, does hereby appeal from said decree to the Circuit Court of Appeals of the Eighth Circuit, for the reasons specified in the assignments of error which is filed herewith; and he prays this appeal be allowed, and that citation issue as provided by law, and that the transcript of proceedings upon which said record was based, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Eighth Circuit, at Saint Louis, Missouri; and the said defendant, J. W. Sunderland, hereby tenders an appeal bond payable to the plaintiff in said action in the sum of Five Hundred ($500.00) Dollars, and prays for an allowance of the appeal.

J. M. SPRINGER and
E. G. WILSON,
Attorneys for Defendant.

The above and foregoing petition for appeal is granted, and the appeal therein prayed for to the United States Circuit Court of Appeals for the Eighth Circuit is this day allowed in open court, and ordered that the bond on appeal be and the same is hereby fixed at the sum of $500.00, the same to act for a cost bond for cost and damages on appeal.

Dated this the 19th day of May, 1922.

R. L. WILLIAMS,
Judge.

Filed May 24, 1922, W. V. McClure, Clerk U. S. District Court.

Assignment of Errors.

Now on this the 24 day of May, 1922, comes J. W. Sunderland, defendant in the above entitled cause of action and alleges and says:

That the decree entered into in this cause on the 2nd day of January, 1922, rendering judgment against said defendant, cancelling and annulling the deed executed and delivered on the 30th day of November, 1918, by Nathaniel Perryman and Fannie Perryman, in favor of the defendant J. W. Sunderland, and also cancelling and annulling the judgment rendered in favor of the defendant J. W. Sunderland, quieting the title

in him, in the Superior Court of Tulsa County, Oklahoma, on April 28th, 1919, in Civil Cause No. 5919, which said property is described, to-wit:

> SE Quarter of Section 8, Township 16 North, Range 13 East, containing 160 acres, more or less, in Tulsa County, Oklahoma,

is erroneous and unjust to him, the said J. W. Sunderland, for the following reasons which he states are and assigns as erroneous in said action and said decree, to-wit:

First: Because the court erred in overruling the motion of the defendant J. W. Sunderland to dismiss the bill for want of equity and for the further reason that said bill of complaint and the allegations therein contained do not state sufficient facts to constitute a cause of action in favor of the plaintiff and against the defendant J. W. Sunderland.

Second: Because the court erred in rendering a judgment cancelling the deed hereinbefore mentioned, made, executed and delivered on the 30th day of November, 1918, by Nathaniel Perryman and Fannie Perryman, running to and in favor of defendant J. W. Sunderland.

Third: Because the court erred in vacating, annulling, setting aside and for naught holding the judgment rendered by the Superior Court of Tulsa County, Oklahoma, on April 28th, 1919, wherein the said Superior Court did on said day render judgment in favor of the defendant J. W. Sunderland quieting the title in the above described premises in the said J. W. Sunderland.

Fourth: Because the court erred in rendering judgment quieting the title in and to the Southeast Quarter of Section 8, Township 16 North of Range 13 East, containing 160 acres, more or less, in Tulsa County, Oklahoma, in Nathaniel Perryman.

Fifth: Because the court erred as a matter of law in holding that the Secretary of the Interior is clothed with the authority to impose restrictions upon unrestricted real estate within the boundary of the State of Oklahoma, upon which no restrictions existed at the time of the attempted imposition of restrictions upon alienation by the Secretary of the Interor; and in holding that the Act of Congress approved May 27th, 1908, conferred upon the Secretary of the Interior the right to impose restrictions upon alienation, a part of which Act reads as follows:

> * * *"All homesteads of said allottees enrolled as mixed-blood Indians having one-half or more than one-half Indian blood, including minors of such *of* degrees of blood, shall not be subject to alienation, contract to sell,

power of attorney, or any other encumbrance prior to April 26th, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposition of proceeds for the benefit of the respective Indians as he may prescribe."

Sixth: The court erred in holding as a matter of law and evidence that the Secretary of the Interior did impose restrictions upon alienation by Nathaniel Perryman at the time the above described premises was purchased from Grant R. McCullough, et al., for the reason the evidence in the case fails wholly and utterly to prove that the Secretary of the Interior did impose restrictions against alienation upon said premises, the evidence in that regard being merely a telegram which was introduced as plaintiff's exhibit No. 17, and which reads as follows:

"Western Union, July 2, 1918, Parker, Superintendent, Muskogee, Oklahoma. Referring your telegram and letter June 27th and 28th, respectively, authority granted you invest on behalf of Nathaniel Perryman Nine Thousand Six Hundred Dollars in purchase property therein described, using a restricted form of deed.

(Signed) C. P. Hauk,
Acting Ass't Commissioner.
Land F. T. 52766-18 55315-18 VWR CPH JWH M."

Seventh: Because the court erred in holding as a matter of law, that the Act of Congress of May 27th, 1908, or any other Act of Congress ever conferred upon the Secretary of the Interior of the United States of America, the right and authority to impose restrictions upon the lands purchased with restricted funds, because forsooth the Act in part provides:

"That from and after sixty days from the date of this Act, the status of the lands ALLOTTED HERETOFORE OR HEREAFTER TO ALLOTTEES of the Five Civilized Tribes," etc.

The Act itself limiting restrictions against alienation upon lands, as to lands that had prior thereto and after the Act been ALLOTTED.

Eighth: The court erred in holding that the Secretary of the Interior has the power or authority to provide in a deed to lands purchased with restricted funds,

* * * "Subject to the conditions that no lease or mortgage, power of attorney, contract to sell, or other instrument effecting the land herein described, or the title thereto, executed during the lifetime of said grantee, at any time prior to April 26, 1931, shall be of no force or effect,

or capable of confirmation or ratification, unless made with the consent of, and approved by, the Secretary of the Interior."

And that said Secretary of the Interior had such authority at the time it was alleged that the above described property was purchased from Nathaniel Perryman.

Ninth: The court erred in finding, as a matter of law and evidence, that the sale of the above described lands to J. W. Sunderland by the said Nathainel Perryman and Fannie Perryman, was not made with the consent or approval of the Secretary of the Interior, for, as a matter of fact, the evidence introduced by the Government failed utterly to show that the Secretary of the Interior never gave his approval of the sale of said lands by the said Nathaniel Perryman and Fannie Perryman to J. W. Sunderland.

Tenth: The court erred in finding that the lands in controversy were purchased by the Superintendent of the Five Civilized Tribes under direction of the Secretary of the Interior with the funds on deposit in his hands and under his official supervision, which were the proceeds of the sale of the homestead allotted to the said Nathaniel Perryman, and further the court erred in finding that the property above described was purchased with restricted funds.

Eleventh: The court erred as a matter of law in rendering judgment finding that the Secretary of the Interior of the United States of America has the authority to impose restrictions on otherwise unrestricted lands so as to interfere with the free trade and commerce between the people of this state and of the several states without the consent and approval of the Secretary of the Interior, because forsooth the exercise of such power is contrary to and in violation of section 3 of article 4 of the Constitution of the United States, in that it denies the admission of Oklahoma into the Union on an equal footing with other states, in that it denies free trade and commerce between the citizens of this state and of the several states with the citizens of this state.

Twelfth: The authority of the Secretary of the Interior exercising the right to impose restrictions upon otherwise unrestricted land is illegal and void and contravenes section 1 of article 1 of the Constitution of the United States in that it attempts to confer upon the Secretary of the Interior the right and authority to legislate upon the subject and thereby formulate, create and promulgate a set of rules whereby he is authorized to impose restrictions in violation of said section 1 which confers upon the Congress of the United States itself the authority to legislate and define by appropriate legislation the power and the authority of the various agencies of the Government.

Thirteenth: The decree violates the spirit of the Constitution of the United States as enunciated in its preamble.

Fourteenth: The court erred in not sustaining the demurrer of the defendant J. W. Sunderland to the evidence of the plaintiff, for the reason that the evidence introduced for and on behalf of the Government wholly fails to prove the allegations of the bill of complaint.

Fifteenth: The decree of the District Court of the Eastern District of Oklahoma violates the 10th amendment to the Constitution of the United States in that there is no authority conferred in said constitution whereby the United States can interfere with the state in the enactment of laws concerning conveyances of real estate. And further, if the Secretary of the Interior has the authority to impose restrictions on alienation, then such authority extends to the right to impose such restrictions free and clear of taxation, and the state would not have the authority to levy and collect taxes on real estate where a restriction is thus imposed within the State of Oklahoma, and the right to levy and collect taxes on real estate within the state, not the property of the United States, but that of a citizen of the state so long as such levy and collecion of taxes conforms to due process of law, and equal protection of the law is a state right, which the Constitution cannot abrogate.

Sixteenth: The decree violates section 3 of article 4 of the Constitution of the United States in that it holds in effect a denial of the right of the State of Oklahoma to tax her own real estate, and a denial of this right is an admission of Oklahoma into the United States on an unequal footing with other states forming the Union, and further, that it denies to the State of Oklahoma the right and authority to legislate respecting trade and commerce in real estate among the people of the State of Oklahoma and the people of other states and, therefore, is the admission of Oklahoma on an unequal footing with other states of the Union.

Seventeenth: The decree violates section 4 of article 4 of the Constitution of the United States in that it gives the United States authority to destroy all form of government within the state, as the state cannot exist without its right to levy and collect taxes on its real estate, and this decree indirectly denies to the state the right to levy and collect taxes upon real estate wherein restrictions are imposed by the act of the Secretary of the Interior upon otherwise unrestricted and taxable lands.

Eighteenth: The decree violates the 5th amendment of the Constitution of the United States in that it takes the property out of the legislative control of the state and places the

same within the control of the United States without due process of law.

Nineteenth: The decree violates section 4 of article 4 of the Constitution of the United States in that the United States is therein pledged to protect the states against invasion, the decree being a serious invasion against the right of the state over unrestricted real estate within the state.

Twentieth: The court erred in not rendering judgment in favor of the defendant, J. W. Sunderland, upon the evidence introduced by both the United States and the defendant J. W. Sunderland.

Wherefore, the defendant prays that the decree of the court rendering judgment cancelling the deed hereinbefore mentioned and also the judgment of the Superior court of Tulsa County, Okla., hereinbefore mentioned, and in vacating the said decree and setting the same aside and holding the same for naught, be reversed, and for the costs of this appeal and for all other proper relief.

J. M. SPRINGER and
E. G. WILSON,
Attorneys for Defendant.

Filed May 24, 1922. W. V. McClure, Clerk U. S. District Court.

Bond on Appeal to the Circuit Court of Appeals.

Know All Men By These Presents:

That, I, J. W. Sunderland, as principal and J. W. Whitney and C. E. Clark, as sureties, and are held and firmly bound unto the United States of America, the plaintiff in the above entitled cause of action, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this the 8th day of May, 1922.

Whereas, lately at the January term of the United States District Court for the Eastern District of the State of Oklahoma, in a suit pending in said county between the United States of America, plaintiff and J. W. Sunderland, defendant, a decree was rendered against the said defendant, J. W. Sunderland, and in favor of the plaintiff, and the said defendant has obtained an order granting an appeal; and

Whereas, the said defendant has filed his petition for appeal, together with assignment of errors procuring an order

allowing said appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order and decree rendered and entered by the United States District Court for the Eastern District of Oklahoma on the 2nd day of January, 1922, in the above entitled cause, and a citation directed to the said United States of America, citing and admonishing it to be and appear in the United States Circuit Court of appeals for the Eighth Circuit at St. Louis, Missouri, sixty (60) days from and after the date of said citation.

Now the condition of the above obligation is such that if the said J. W. Sunderland shall prosecute his appeal to effect and answer all damages and costs, if he fails to make good his plea, then the above obligation to be void. Otherwise to remain in full force and effect.

J. W. SUNDERLAND,
J. W. WHITNEY,
C. E. CLARK.

Approved this 9th day of May, 1922.

R. L. WILLIAMS,
Judge.

State of Oklahoma, County of Tulsa, ss.

I, J. W. Whitney, as surety on the above bond, being first duly sworn on my oath, say that I am a resident of Tulsa County, State of Oklahoma, and that I am worth over and above all my debts, liabilities, exemptions, the sum of $10,000.00, and that I own the following real estate, to-wit: The Northwest Quarter of the Northwest Quarter of the Northwest Quarter of Township 20 N., Range 13 East, Tulsa County, State of Oklahoma, free from encumbrance, and that the same is not my homestead and that the reasonable value thereof is Five Thousand ($5000.00) Dollars, and that he owns other real estate located in Creek County, Oklahoma, not my homestead, worth and of the value of $10,000.00.

J. W. WHITNEY.

Subscribed in my presence and sworn to before me this 8 day of May, 1922. Elise Fern Purdy, Notary Public. (Seal) My commission expires 2/15/26.

State of Oklahoma, County of Tulsa, ss.

I, C. E. Clark, as surety on the above bond, being first duly sworn on my oath, say that I am a resident of Tulsa County, State of Oklahoma, and that I am worth over and above all my debts, liabilities and exemptions, the sum of $10,000.00, and that I own the following real estate, to-wit:

Lots 8 and 9 in Block 7, Bellview Addition to the City of Tulsa,

and that the same is not his homestead and that the reasonable value thereof is $10,000.00

C. E. CLARK.

Subscribed and sworn to before me this 12 day of May, 1922. Elsie Fern Purdy, Notary Public. (Seal) My commission expires 2-15-26.

Filed May 24, 1922. W. V. McClure, Clerk U. S. District Court.

Citation.

The United States of America to the United States of America, greeting:

You are hereby cited and admonished to be present and appear before the United States Circuit Court of Appeals for the 8th Circuit at St. Louis, Missouri, sixty days from and after the date this citation bears date, pursuant to an appeal allowed and filed in the clerk's office in the District Court of the United States for the Eastern District of Oklahoma, wherein J. W. Sunderland is appellant and you are appellee, to show cause, if any there be, why decree rendered against said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness, the Honorable Robert L. Williams, judge of the District Court of the United States for the Eastern District of Oklahoma, this the 19th day of May, 1922.

R. L. WILLIAMS,
Judge of the United States DistrictCourt of the Eastern District of Oklahoma.

Service of the above and foregoing citation is acknowledged and accepted this the 24th day of May, 1922.

FRANK LEE,
U. S. Attorney.
By O. H. GRAVES,
Spl. Asst. U. S. Attorney.

Praecipe.

To the Hon. Vane McClure, clerk of the above named court, greeting:

You will please include in the transcript on appeal the following named portion of the record in the above entitled cause:

1st. The bill of complaint filed in this case and amendment to bill of complaint.

2nd. The motion to dismiss said bill of complaint.

3rd. The order of the court overruling the motion to dismiss said bill of complaint, showing the exceptions of the defendant thereto.

4th. The answer to said bill of complaint.

4th-A. Disclaimer of Fannie Perryman.

5th. All of the evidence taken and introduced on the trial of said cause.

6th. Final decree signed and entered in this cause on the 2nd day of January, 1922.

7th. The petition for appeal to the United States Circuit Court of Appeals for the Eighth Circuit and order allowing the same.

8th. The assignment of errors filed in this cause.

9th. The citation on appeal and acceptance of service and return thereon.

10th. Bond on appeal with order of approval and order staying mandate and all other pleadings filed, orders made, or proceedings had in said cause on and subsequent to the second day of January, 1922.

11th. Praecipe and election for printing the record.

12th. Acceptance of service of praecipe and election for printing the record.

The appellant, J. W. Sunderland, hereby elects to have the record printed under the supervision of the clerk of the United States District Court for Eastern District of Oklahoma at Muskogee, Okla.

J. M. SPRINGER and
E. G. WILSON,
Attorneys for J. W. Sunderland.

I, the undersigned, authority and United States District Attorney within and for the Eastern District of the State of Oklahoma, hereby acknowledge receipt of above designation of parts of record necessary for the cause of errors assigned by appellant in the above entitled cause, and waive the designation of any further part or parts of the record material or necessary to properly present the errors assigned by appel-

lant; and I hereby accept service of the same and service of the above election as to printing record.

Dated this the 25th day of May, 1922.

FRANK LEE,
United States District Attorney for the Eastern District of the State of Oklahoma.

By O. H. GRAVES,
Special Assistant U. S. Attorney.

Filed May 25, 1922. W. V. McClure, Clerk U. S. District Court.

Certificate of Clerk.

United States of America, Eastern District of Oklahoma—ss.

I, W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of United States of America vs. J. W. Sunderland, et al., In Equity No. 2567, as was ordered by praecipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I further certify that the citation attached hereto, and returned herewith, is the original citation issued in this cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Muskogee, this 19th day of June, A. D. 1922.

W. V. McCLURE, Clerk.

(Seal) By WARREN BUTZ, Deputy.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

APPEARANCES—Filed June 26, & 29, 1923

The Clerk will enter my appearance as Counsel for the Appellant. J. M. Springer and E. G. Wilson, Tulsa, Oklahoma.

[File endorsement omitted.]

The Clerk will enter my appearance as Counsel for the Appellee. Frank Lee, United States Attorney, Muskogee, Oklahoma. O. H. Graves, Spec. Asst. United States Atty., Muskogee, Oklahoma.

[File endorsement omitted.]

IN U. S. CIRCUIT COURT OF APPEALS, DECEMBER TERM, 1922

ORDER OF SUBMISSION

Monday, January 15, 1923.

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. M. Springer for appellant, continued by Mr. O. H. Graves, Special Assistant United States Attorney, for appellee, and concluded by Mr. J. M. Springer for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER TERM, A. D. 1922

No. 6121

[Title omitted]

Mr. J. M. Springer (Mr. E. G. Wilson on the brief with him), for appellant.

Mr. O. H. Graves, Special Assistant United States Attorney (Mr. Frank Lee, United States Attorney, on the brief with him), for appellee.

Before Stone, Circuit Judge, and Trieber and Johnson, District Judges

OPINION—Filed Mar. 5, 1923

TRIEBER, District Judge, delivered the opinion of the Court.

The United States instituted this action to cancel and set aside three leases and a conveyance of 160 acres of land, made to appellant by Nathaniel Perryman, a half-blood citizen of the Creek Nation of Indians, properly enrolled, and also a decree of the Superior Court of Tulsa County, State of Oklahoma, rendered by default against Nathaniel Perryman, which quieted appellant's title to the premises sued for in this action.

The material allegations in the complaint are that Perryman, a half-blood citizen of the Creek Nation of Indians, properly enrolled, had allotted to him certain lands designated as his homestead, and which were under restrictions of alienation; that pursuant to and under the rules and regulations prescribed by the Secretary of the Interior, said homestead allotment was sold, the proceeds of said sale being retained by the Secretary of the Interior to be disbursed under his orders for the benefit of the allotte-; that with a portion of the funds thus derived the Indian Department purchased for and on behalf of the said Nathaniel Perryman the land in controversy; that the deed of conveyance for said land, in conformity with the rules and regulations of the Secretary of the Interior, contains in the habendum clause, that it is "subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the life time of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or radification, unless made with the consent of and approved by the Secretary of the Interior".

It is then charged that notwithstanding the restricted character of said land, the defendant obtained from Nathaniel Perryman three separate leases therefor, and an absolute deed of conveyance for the land, without the consent and approval of the Secretary of the Interior. By an amendment to the complaint it is charged that the defendant Sunderland, had obtained a decree in the Superior Court of Tulsa County, Oklahoma, quieting title in the defendant Sunderland and the lands involved in this action, but to which action the United States government was not a party.

A motion of appellant to dismiss the complaint was by the court overruled, whereupon he filed his answer.

The answer admits the citizenship and enrollment of Perryman, the conveyance of the land in controversy to Perryman, with the restrictive clause as charged in the complaint, the execution by Perryman of the leases and the deed of conveyance to appellant, as charged, and pleads as defense Perryman's right to make the leases and the deed and also pleads the decree of the Superior Court of Tulsa County, Oklahoma, a certified copy of that decree having been introduced in evidence.

Upon a hearing the court below rendered a decree denying relief affecting the leases, but set aside and cancelled the deed to appellant, and the decree of the Superior Court of Tulsa County, State of Oklahoma, and enjoining appellant from setting up any claim of title to said land or any part thereof.

As the United States did not appeal from the part of the decree refusing to cancel the leases, we are only concerned with the part of the decree cancelling the deed of conveyance of Perryman to appellant.

The undisputed facts established in the truth of all the allegations and the only questions involved are whether the rules and regulations of the Secretary of the Interior were authorized to be made, and if authorized by Congress, whether Congress had the power to authorize them, and the effect of the decree of the Superior Court of Tulsa County.

The Act of Congress under which the land in controversy is claimed to be restricted, is the Act of May 27, 1908, Ch. 199, 35 St. 312. The part of that Act material to a determination of the issues involved herein, is in Section 1, and it is only necessary to quote the following part of that section.

"Sect. 1. That from and after sixty days from the date of this Act the status of the land allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as inter-married whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

By authority of the provision authorizing the Secretary of the Interior to make rules and regulations he prescribed among others the following:

"6. When, however, the Secretary of the Interior finds it to be for the best interest of any applicant that all or part of his restricted lands should be sold with conditions concerning terms of sale and disposal of the proceeds, he may remove the restrictions to become effective only and simultaneously with the execution of the deed by said applicant to the purchaser. Before said deed is executed the

designated tract or tracts of land shall be sold upon such terms as the Secretary of the Interior may in each case specifically direct. Whenever the Secretary of the Interior so directs the Superintendent for the Five Civilized Tribes will cause a description of the land with necessary information, to be posted at his office, and so far as practicable, on the bulletin board at the Court House of each county within the territory occupied by the Five Civilized Tribes, and also at the office of each field clerk for a period of not less than thirty days."

"11. The proceeds of such sales shall be held by said Superintendent for the Five Civilized Tribes in his official capacity, and be disbursed for the benefit of the respective Indians."

"20. In any case where lands are purchased for the use and benefit of any citizen of the Five Civilized Tribes of the restricted class, payment for which is made from proceeds arising from the sale of restricted allotted land, or other moneys held under the control of the Department of the Interior, the Superintendent, for the Five Civilized Tribes shall cause conveyance of such lands, to be made on form of conveyance containing an habendum clause against alienation or encumbrance until April 26, 1931, as follows:

" 'To Have And To Hold said described premises, unto the said grantee, — heirs and assigns forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, Unless Made With The Consent Of And Approved By The Secretary Of The Interior.' "

When the Indian Department purchased the land in controversy with the moneys realized from the sale of Perryman's restricted homestead, it invested it in the land in controversy, executing a warranty deed to Perryman, containing the following restriction in the habendum clause:

"To have and to hold said described premises, unto the said grantee, his heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26th, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior."

That under the provisions of Section 1 of this Act the Secretary of the Interior had the right to make regulation 20, and that such

a restriction as is contained in the deed to Perryman is valid, has been determined by this court in United States v. Law, 250 Fed. 218, 162 C. C. A. 354, and under a similar Act in United States v. Thurston County, 143 Fed. 287, 74 C. C. A. 425; by the U. S. Circuit Court of Appeals for the Ninth Circuit in National Bank of Commerce v. Anderson, 147 Fed. 87, 77 C. C. A. 259, and by Judge Budkin in United States v. Yakima County, 274 Fed. 115. But counsel for appellant insists that these cases have in effect been overruled by this court in United States v. Gray, 284 Fed. 103, and United States v. Ranson, 284 Fed. 108. But the only questions before the court in those cases were whether lands in the State of Oklahoma subject to taxation by the State, by reason of being owned by white citizens, became exempt from such taxation when purchased by the United States for an Indian ward, with funds realized from a sale of restricted lands belonging to an Indian, the deed containing a restriction like the one in the deed to Perryman. The court held that the land did not, by such a purchase, become exempt from taxation. Judge Lewis speaking for the court said:

"The sole controversy presented here is whether the lots, on being purchased by Lizzie Lewis (which were subject to taxation by the State) became exempt from taxation."

The learned Circuit Judge expressly held that the Thurston County and Law cases were inapplicable on the facts to the cases before the court.

Another case relied on for appellant is McCurdy v. United States, 246 U. S. 263. But that case arose under the Acts of June 28, 1906, 34 St. 539, and April 18, 1912, 37 St. 86, which applied to the Osage Indians and differs materially from the Act of May 27, 1908, now under consideration. The court there held that the Secretary's authority could only be sustained on Sect. 5 of the Act of 1912, and that section did not authorize him to make the regulation, which is similar to that in rule 20 involved in the instant case. The court referred to the Thurston county case, distinguished it, but neither criticized nor expressed a doubt as to its correctness. The Law case was decided later and Judge Booth, who delivered the opinion of this court in the Law case, distinguished the McCurdy case, holding that it is inapplicable to the Act of 1908, the Act herein under consideration.

It is next contended that if Congress did vest such power in the Secretary of the Interior, that part of the Act is unconstitutional.

Counsel attack the constitutionality of this provision of the Act on three grounds:

1. That it is a delegation of legislation to the executive department, which is not permissible.

2. That as these Indians are no longer residing in a Territory of the United States, but in a State of the Union, Congress is without power to legislate for the protection of their property, but they must look to the State alone for it.

3. That the national government can only deal with Indians by treaty and not by an Act of Congress.

As to the contention that an Act of Congress vesting in the President or the head of an executive department the right to make rules and regulations, for the purpose of providing the details necessary to the enforcement of a statute, which regulations shall have the force of law, is a delegation of legislation is clearly without merit. This it may be done has been so frequently decided by the Supreme Court that it is unnecessary to cite authorities.

Nor is the contention that Congress is without power to legislate for the protection of Indians in a State tenable. Bowling v. United States, 233 U. S. 528; La Motte v. United States, 254 U. S. 570, and authorities there cited. The concluding part of Sect. 6 of the Act expressly provides it. It reads: "Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any kind or character whatever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof." That Congress may enact laws for the protection of Indians, and that the government is not limited to do so by treaties with them, is equally well settled. While for a long time the government conducted its dealings with Indians by treaties, this course was abandoned when it passed the Act of March 3, 1871, Ch. 120, 16 St. 566, 2079 Rev. St. (Sect. 4034 U. S. Comp. St. 1916) and the Act of March 3, 1885, Ch. 341, 23 St. 385, re-enacted as Sect. 328 of the Penal Code (Sect. 10502 U. S. Comp. St. 1916). The constitutionality of these Acts has been sustained, that of 1871 in Lone Wolf v. Hitchcock, 187 U. S. 566, and In re Heff, 197 U. S. 488, and the Act of 1855 in United States v. Kagama, 118 U. S. 375. In McCurdy v. United States, supra, it was held that Congress may reimpose restrictions on Indians, while national wards although previously freed from restrictions. It is as much the duty of Congress as the guardian of Indians to protect them against being overreached by designing persons and protect them against their own ignorance and child-like inability to take care of their property, as long as, in the opinion of Congress, they are incompetent, as it is the duty of the State to protect its incompetents, regardless of the fact that they reside and their property is situated in a State. The change of form of the property does not deprive Congress of this power. Heckman v. United States, 224 U. S. 413; United States v. Thurston County, supra; United States v. Law, supra.

The enabling Act of Oklahoma does not change this. On the contrary by Sect. 3 of Par. 3 of that Act, Congress expressly reserved that power. Cleason v. Wood, 28 Okla. 502, 114 Pac. 703.

The decree of the State court against Perryman, an incompetent Indian of half-blood, and for this reason a ward of the Nation, the United States not being a party to the action, is void and the court

committed no error in enjoining appellant from claiming any rights under it. United States v. Moore, 284 Fed. 86.

The decree of the court below was right and is affirmed.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT DECEMBER TERM, 1922, MONDAY, MARCH 5, 1923

[Title omitted]

DECREE

Appeal from the District Court of the United States for the Eastern District of Oklahoma

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

March 5, 1923.

IN U. S. CIRCUIT COURT OF APPEALS

PETITION FOR AND ORDER ALLOWING APPEAL—Filed May 7, 1923

Comes now the appellant, J. W. Sunderland, defendant in the United States District Court within and for the Eastern District of the State of Oklahoma, and presents this petition to Honorable Kimbrough Stone, sitting as Judge and deciding and concurring in the opinion rendered in this case affirming the decree of the lower court, and alleges and says:

That said appellant, J. W. Sunderland, the defendant in the said lower court and the appellant in this court, and feeling himself aggrieved by the decree made and entered in this cause on the 5th day of March, A. D. 1923, does hereby appeal from said decree to the Supreme Court of the United States of America upon the grounds and for the reasons specified in the assignments of error which is filed herewith, and he prays that this appeal be allowed and that citation issue as provided by law and that the transcript of the proceedings upon which said record was based duly authenticated may be sent to the Supreme Court of the United States of America; and the said appellant, J. W. Sunderland, hereby tenders and presents an

appeal bond, payable to the United States of America in said action in the sum of $1,000.00 and prays for an allowance of the appeal.

J. M. Springer & Elbridge G. Wilson, Attorneys for Appellant.

The above and foregoing petition for appeal is granted, and the appeal therein prayed for to the Supreme Court of the United States is this day allowed and ordered that the bond on appeal be and the same is hereby fixed at the sum of $1,000.00, the same to act for a cost bond for cost and damages of the appeal.

Dated this the 4th day of May, 1923.

Kimbrough Stone, U. S. Circuit Judge, Eighth Circuit.

[File endorsement omitted.]

IN U. S. CIRCUIT COURT OF APPEALS

ASSIGNMENT OF ERRORS—Filed May 7, 1923

Now on this the 10th day of April, 1923, comes J. W. Sunderland, appellant in the above entitled cause of action and defendant in the trial court, and alleges and says:

That the decree made and entered and filed in this case on or about the 5th day of March, A. D. 1923, rendering judgment against the appellant and affirming the judgment of the lower Court, to-wit, The United State District Court within and for the Eastern District of the State of Oklahoma, cancelling and annulling the deed executed and delivered on the 30th day of November, 1918, by Nathaniel Perryman and Fannie Perryman in favor of the defendant J. W. Sunderland, and also cancelling and annulling the judgment rendered in favor of the defendant, J. W. Sunderland, quieting the title in him in the Superior Court of Tulsa County, Oklahoma, on the 28th day of April, 1919, in Civil Cause No. 5919, which said property is described as follows, to-wit:

Southeast Quarter of Section 8, Township 16 North of Range 13 East, containing 160 acres, more or less, in Tulsa County, Oklahoma.

is erroneous, and unjust to him, the said J. W. Sunderland, for the following reasons which he states are and assigns as erroneous and unjust and injurious to him in said action and in the decree of the said lower Court and in the decree of the said appellate court and in said decrees, to-wit:

First. The decree of the appellate court made and entered as aforesaid on the 5th day of March, 1923, affirming the judgment and decree of the said lower court, to-wit, the United States District Court within and for the Eastern District of the State of Oklahoma, is injurious and unjust and erroneous.

(a) No such questions were involved in the appeal as were decided by said United States Circuit Court of Appeals.

(b) The said United States Circuit Court of Appeals failed to decide the matter and things in controversy involved and inhering in the appeal.

(c) It was never contended in the lower court or in the appellate court that Congress did not have power and authority to delegate authority to the Secretary of the Interior.

(d) It was never contended in the lower court nor said appellate court that when Oklahoma becoming a state, Congress has no power or authority to legislate respecting the Indians within the state.

Second. The appellant alleges and says that there was presented to said Circuit Court of Appeals for its disposition and also which are presented to this Court for its disposition, and which this appellant alleges as grounds of error, the following specifications of error, to-wit:

Third. Because the court erred in overruling the motion of the defendant J. W. Sunderland to dismiss the bill for want of equity and for the further reason that said bill of complaint and the allegations therein contained do not state sufficient facts to constitute a cause of action in favor of the plaintiff and against the defendant J. W. Sunderland.

Fourth. Because the court erred in rendering a judgment cancelling the deed hereinbefore mentioned, made, executed and delivered on the 30th day of November, 1918, by Nathaniel Perryman and Fannie Perryman, running to and in favor of defendant, J. W. Sunderland.

Fifth. Because the court erred in vacating, annulling, setting aside and for naught holding the judgment rendered by the Superior Court of Tulsa County, Oklahoma, on April 28th, 1919, wherein the said Superior Court did on said day render judgment in favor of the defendant, J. W. Sunderland, quieting the title in the above described premises in the said J. W. Sunderland.

Sixth. Because the court erred in rendering judgment quieting the title in and to the Southeast Quarter of Section 8, Township 16 North of Range 13 East, containing 160 acres, more or less in Tulsa County, Oklahoma, in Nathaniel Perryman.

Seventh. Because the Court erred as a matter of law in holding that the Secretary of the Interior is clothed with the authority to impose restrictions upon unrestricted real estate within the boundary of the State of Oklahoma, upon which no restrictions existed at the time of the attempted imposition of restrictions upon alienation by the Secretary of the Interior; and in holding that the Act of Congress approved May 27th, 1908, conferred upon the Secretary of the Interior the right to impose restrictions upon alienation, a part of which Act reads as follows:

* * * "All homesteads of said allottees enrolled as mixed-blood Indians having one-half or more than one-half Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or any other encumbrance prior to April 26th, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposition of proceeds for the benefit of the respective Indians as he may prescribe."

Eighth. The court erred in holding as a matter of law and evidence that the Secretary of the Interior did impose restrictions upon alienation by Nathaniel Perryman at the time the above described premises was purchased from Grant R. McCullough, et al., for the reason the evidence in the case fails wholly and utterly to prove that the Secretary of the Interior did impose restrictions against alienation upon said premises, the evidence in that regard being merely a telegram which was introduced as plaintiff's exhibit No. 17, and which reads as follows:

"Western Union, July 2, 1918.

Parker, Superintendent, Muskogee, Oklahoma.

Referring your telegram and letter June 27th and 28th respectively, authority granted you invest on behalf of Nathaniel Perryman Nine Thousand Six Hundred Dollars in purchase property therein described. using a restricted form of deed.

(Signed) C. P. Hauk, Acting Asst. Commission. Land F. T. 52766-18, 55315-18. VWR. CPH. JWH. M."

Ninth. Because the Court erred in holding as a matter of law, that the Act of Congress of May 27th, 1908, or any other Act of Congress ever conferred upon the Secretary of the Interior of the United States of America, the right and authority to impose restrictions upon the lands purchased with restricted funds, because, forsooth the Act in part provides:

"That from and after sixty days from the date of this Act, the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes," etc.

The Act itself limiting restrictions against alienation upon lands, as to lands that had prior thereto and after the act been allotted.

Tenth. The court erred in holding that the Secretary of the Interior has the power or authority to provide in a deed to lands purchased with restricted funds—

* * * "Subject to the conditions that no lease or mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the lifetime of said grantee, at any time prior to April 26, 1921, shall

be of no force or effect, or capable of confirmation or ratification, unless made with the consent of, and approved by the Secretary of the Interior."

And that said Secretary of the Interior had such authority at the time it was alleged that the above described property was purchased from Nathaniel Perryman.

Eleventh. The court erred in finding as a matter of law and evidence, that the sale of the above described lands to J. W. Sunderland by the said Nathaniel Perryman and Fannie Perryman, was not made with the consent or approval of the Secretary of the Interior, for, as a matter of fact, the evidence introduced by the Government failed utterly to show that the Secretary of the Interior never gave his approval of the sale of said lands by the said Nathaniel Perryman and Fannie Perryman to J. W. Sunderland.

Twelfth. The court erred in finding that the lands in controversy were purchased by the Superintendent of the Five Civilized tribes under direction of the Secretary of the Interior with the funds on deposit in his hands and under his official supervision, which were the proceeds of the sale of the homestead allotted to the said Nathaniel Perryman, and further the court erred in finding that the property above described was purchased with restricted funds.

Thirteenth. The court erred as a matter of law in rendering judgment finding that the Secretary of the Interior of the United States of America has the authority to impose restrictions on otherwise unrestricted lands so as to interfere with the free trade and commerce between the people of this state and of the several states without the consent and approval of the Secretary of the Interior, because forsooth the exercise of such power is contrary to and in violation of section 3 of article 4 of the Constitution of the United States, in that it denies the admission of Oklahoma into the Union on an equal footing with other states, in that it denies free trade and commerce between the citizens of this state and of the several states with the citizens of this state.

Fourteenth. The authority of the Secretary of the Interior exercising the right to impose restrictions upon otherwise unrestricted land is illegal and void and contravenes section 1 of article 1 of the Constitution of the United States in that it attempts to confer upon the Secretary of the Interior the right and authority to legislate upon the subject and thereby for-ulate, create and promulgate a set of rules whereby he is authorized to impose restrictions in violation of said section 1 which confers upon the Congress of the United States itself the authority to legislate and define by appropriate legislation the power and authority of the various agencies of the Government.

Fifteenth. The decree violates the spirit of the Constitution of the United States as enunciated in its preamble.

Sixteenth. The court erred in not sustaining the demurrer of the defendant J. W. Sunderland to the evidence of the plaintiff, for the reason that the evidence introduced for and on behalf of the Government wholly fails to prove the allegations of the bill of complaint.

Seventeenth. The decree of the District Court of the Eastern District of Oklahoma violates the 10th amendment to the Constitution of the United States in that there is no authority conferred in said constitution whereby the United States can interfere with the state in the enactment of laws concerning conveyances of real estate. And further, if the Secretary of the Interior has the authority to impose restrictions on alienation, then such authority extends to the right to impose such restrictions free and clear of taxation, and the state would not have the authority to levy and collect taxes on real estate where a restriction is thus imposed within the State of Oklahoma, and the right to levy and collect taxes on real estate within the state, not the property of the United States, but that of a citizen of the state so long as such levy and collection of taxes conforms to due process of law, and equal protection of the law is a state right, which the Constitution cannot abrogate.

Eighteenth. The decree violates section 3 of article 4 of the Constitution of the United States in that it holds in effect a denial of the right of the State of Oklahoma to tax her own real esate, and a denial of this right is an admission of Oklahoma into the United States on an unequal footing with other states forming the Union, and further, that it denies to the State of Oklahoma the right and authority to legislate respecting trade and commerce in real estate among the people of the State of Oklahoma and the people of other states and, therefore, is the admission of Oklahoma on an unequal footing with other states of the Union.

Nineteenth. The decree violates section 4 of article 4 of the Constitution of the United States in that it gives the United States auhority to destroy all form of government within the state, as the state cannot exist without its right to levy and collect taxes on its real estate. and this decree indirectly denies to the state the right to levy and collect taxes upon real state wherein restrictions are imposed by the act of the Secretary of the Interior upon otherwise unrestricted and taxable lands.

Twentieth. The decree violates the 5th amendment of the Constitution of the United States in that it takes the property out of the legislative control of the state and places the same within the control of the United States without due process of law.

Twenty-first. The decree violates section 4 of article 4 of the Constitution of the United States in that the United States is therein pledged to protect the states against invasion, the decree being a serious invasion against the right of the state over unrestricted real estate within the state.

Twenty-second. The court erred in not rendering judgment in favor of the defendant, J. W. Sunderland, upon the evidence introduced by both the United States and the defendant J. W. Sunderland.

Wherefore, the defendant prays that the decree of the lower court rendering judgment cancelling the deed hereinbefore mentioned and also the judgment of the Superior Court of Tulsa County, Oklahoma, hereinbefore mentioned, and in vacating the said decree and setting the same aside and holding the same for naught, be reversed, and for the costs of this appeal and for all other proper relief, and also the decree of the Circuit Court of Appeals affirming said judgment.

J. M. Springer & Elbridge G. Wilson, Attorneys for Appellant.

[File endorsement omitted.]

BOND ON APPEAL—For $1,000.00; filed and approved May 7, 1923; omitting in printing

IN U. S. CIRCUIT COURT OF APPEALS

PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed May 7, 1923

To the Clerk of the United States Circuit Court of Appeals within and for the Eighth Circuit, at St. Louis, Mo., Greetings:

You will please prepare the record to appeal the above entitled cause of action to the Supreme Court of the United States and you will please include within said record, the following:

1. A transcript and entire record certified to said Circuit Court of Appeals by the Clerk of the United States District Court within and for the Eastern District of the State of Oklahoma, extra copies of which are now on file in your office, and you will attach to the same and supplement said record by the following:

First. The petition filed in this court for appeal to the Supreme Court of the United States.

Second. The assignment of errors filed in this Court.

Third. The appeal bond.

Fourth. The citation.

Fifth. The order allowing the appeal.

Sixth. And any and all other pleadings, papers, documents and proceedings necessary to make up a complete record appealing said case to the Supreme Court of the United States of America, including the decree of this Court rendered on the 5th day of March, 1923.

J. M. Springer & Elbridge G. Wilson, Attorneys for Appellant.

[File endorsement omitted.]

ACKNOWLEDGMENT OF SERVICE OF PRÆCIPE

I hereby acknowledge service of the præcipe for making up the record to appeal the above entitled cause of action to the Supreme Court of the United States from the United States Circuit Court of Appeals within and for the Eighth circuit.

Witness my hand this the 11th day of April, 1923.

Frank Lee, United States District Attorney. O. H. Graves, Special Assistant U. S. Atty.

[File endorsement omitted.]

CITATION AND SERVICE—Filed May 18, 1923; omitted in printing

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

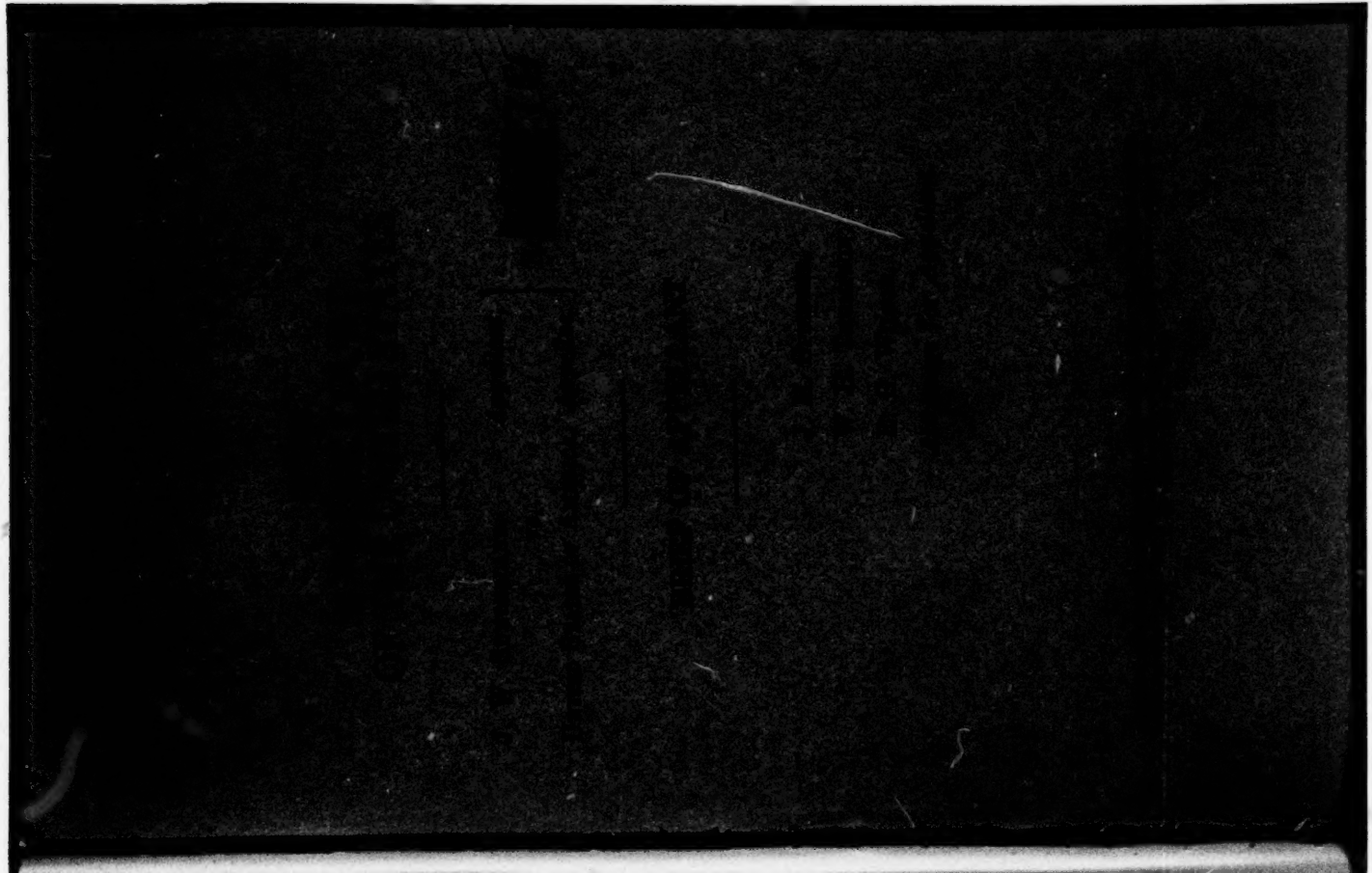
I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of counsel for appellant, in a certain cause in said Circuit Court of Appeals wherein J. W. Sunderland was Appellant and the United States of America was Appellee, No. 6121, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-first day of May, A. D. 1923.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal of United States Circuit Court of Appeals, Eighth Circuit.]

Endorsed on cover: File No. 29,665. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 355. J. W. Sunderland, appellant, vs. The United States of America. Filed June 5th, 1923. File No. 29,665.



INDEX

IN THE

SUPREME COURT OF THE UNITED STATES

J. W. SUNDERLAND, - - *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.
No. 355.

BRIEF OF APPELLANT

Statement of Facts

Nathaniel Perryman is a half-blood citizen of the Creek Nation of Indians and is enrolled as such opposite No. 2220. By reason of his tribal relation there was allotted to him the East Half of the Northeast Quarter and the Southwest Quarter of the Northeast Quarter of Section 7-19-13 as surplus lands. And there was allotted to him, as his homestead, the Northwest Quarter of the Northeast Quarter of Section 7-19-13 in Tulsa County, Oklahoma.

Grant R. McCullough and L. K. Cone are white people and prior to the 24th day of June, 1918, were the owners of the Southeast Quarter of Section 8-16-13. The land owned by Grant R. McCullough and L. K. Cone was, prior to the 24th day of

June, 1918, and had been since July 10th, 1909, unrestricted land and subject to trade and commerce among the people of the State of Oklahoma, and subject to the taxing power of the State, and subject to the judgments, decrees, orders and processes of the Courts of the State of Oklahoma, and was subject to litigation in the State Courts.

On the 24th day of June, 1918, Grant R. McCullough and his wife, and L. K. Cone and his wife, conveyed by warranty deed to Nathaniel Perryman the lands last above described. On November 30th, 1918, Nathaniel Perryman, and wife, conveyed by warranty deed the lands last above described to J. W. Sunderland, the appellant in this case.

On May 21st, 1919, the appellee filed in the United States Court within and for the Eastern District of Oklahoma its bill of complaint by which, it sought to cancel the deed made, executed and delivered by Nathaniel Perryman and his wife, Fannie Perryman, to J. W. Sunderland, the appellant herein, by which the Perrymans conveyed to Sunderland the Southeast Quarter of Section 8, Township 16 North of Range 13 East, located in Tulsa County, Oklahoma.

In the bill it is substantially alleged that Nathaniel Perryman is a one-half blood Creek citizen, enrolled opposite No. 2220 of the approved rolls of citizens by blood of the Creek Nation; that there

was allotted to Nathaniel Perryman certain lands which are not described, forty acres of which constituted his homestead; that permission was asked and received of the Secretary of the Interior to sell a portion of the homestead, to-wit, 10 acres, which was accordingly done, and a portion of the proceeds derived from such sale was invested in the lands above described; that pursuant to the rules and regulations of the Secretary of the Interior there was incorporated in the habendum clause to the said Nathaniel Perryman a restriction against alienation, by virtue of which any lease, deed, mortgage, power of attorney, contract to sell or other instrument affecting the lands therein described or the title thereto, executed during the life of said grantee at any time prior to April 26, 1931, unless made with the consent of and approval by the Secretary of the Interior, should not be of any force or effect or capable of confirmation or ratification; that by reason of said restriction against alienation at any time prior to the 26th day of April, 1931, any conveyance by the said Nathaniel Perryman was illegal and void because of and for the reason that the lands were purchased with released funds derived from the sale of a portion of the homestead allotted to Nathaniel Perryman (Record, pp. 1-13, inclusive).

By an amendment filed to the Bill of Complaint the United States sought to vacate and set aside a

judgment rendered by the Superior Court of Tulsa County, Oklahoma, quieting the title to said lands in the appellant. (Record, pp. 1 to 13, inclusive.) To this bill of complaint, the appellant filed a motion to dismiss for want of equity (Record, p. 13), which was duly presented to the District Court and overruled and exceptions to the order of the court duly saved. (Record, p. 14.) The appellant then filed his answer denying generally and specifically all of the allegations of the bill of complaint and pleading further:

That there was no restriction against alienation incorporated in the deed, by which the lands were conveyed to Nathaniel Perryman pursuant to any rules or regulations of the Secretary of the Interior; that any restriction therein contained was not authorized by such rules and regulations; that the Secretary of the Interior had no authority to incorporate in the deed restrictions against the alienation of said real estate; that said land described in the bill of complaint was not subject to restrictions by law against alienation or incumbrance, but on the contrary, said land was not at any time prior to or since the execution of said deed, subject to any restriction upon the alienation or encumbrance by Nathaniel Perryman or any other person. The appellant further pleaded a judgment rendered in his favor in the Superior Court of Tulsa County, Oklahoma, on the 28th day of April,

1919, by which the title to said land was quieted in the appellant (Record, pp. 14 to 22, inclusive).

The appellant pleaded further that at the time of the purchase of the lands in dispute here, the said Nathaniel Perryman was the owner of a portion of his original homestead allotment and that the value thereof was about $30,000. The answer filed by the appellant further shows the derainment of title to him as follows, to-wit: The lands in dispute here were allotted to Daniel Bigpond by the Muskogee-Creek Nation on the 14th day of April, 1904; that said Daniel Bigpond died on the 29th day of April, 1907, leaving surviving him as his only heirs at law his widow, Nancy Bigpond, and a son, Albert Bigpond, and his daughter, Eliza Bigpond; that on the 15th day of December, 1908, the said Nancy Bigpond sold and conveyed her interest in and to said premises to one H. U. Bartlett, who, on the 14th day of February, 1911, sold and conveyed his interest to Grant R. McCullough and L. K. Cone; that on July 10, 1909, the interests of the said Albert Bigpond and Eliza Bigpond, minors, were duly sold and conveyed by their guardian to Grant R. McCullough, and on the 24th day of June, 1918, the said Grant R. McCullough and wife and L. K. Cone and wife sold and conveyed said real estate to Nathaniel Perryman, who, on November 30, 1918, sold and conveyed said premises to the appellant. (Record, p. 18.) The answer filed by

the appellant was in no way denied and therefore the issues raised by the allegations therein stand admitted.

On the issues thus joined a trial was had to the Court which was concluded on the 2nd day of January, 1922, and thereupon the Court rendered judgment cancelling and setting aside the deed made, executed and delivered by Nathaniel Perryman and Fannie Perryman to appellant on the 30th day of November, 1918, and vacating and setting aside the judgment of the Superior Court of Tulsa County, Oklahoma, made and entered on the 28th day of April, 1919, quieting the title to said premises in the appellant, to which decree and judgment of the court the appellant duly reserved an exception. (Record, pp. 22, 23, 24 and 25.)

It is thus seen that the power of the Secretary of the Interior to impose restrictions against alienation at any time prior to the 26th day of April, 1931, on land purchased with released funds, which at the time of purchase, and for a long time prior thereto, WERE AND HAVE BEEN FREE FROM ALL RESTRICTIONS AND THE SUBJECT OF TRADE AND COMMERCE AND CAPABLE OF BEING SOLD AND TRANSFERRED FROM HAND TO HAND, GOVERNED SOLELY BY THE LAWS OF THE STATE OF OKLAHOMA RESPECTING CONVEYANCES, is involved in

this case and is squarely presented to this Court for its adjudication.

Within due time the appellant prosecuted his appeal to the Eighth United States Circuit Court of Appeals. (Record, pp. 87 to 96).

The appeal was heard in the Eighth United States Circuit Court of Appeals on the 14th day of January, 1923, and on the 5th day of March, 1923, thereafter the Circuit Court of appeals rendered judgment affirming the judgment of the trial court. (Record, pp. 98 to 103.)

April 10, 1923, the appellant prayed an appeal to this Court, which was allowed (Record, pp. 103-4-5-6-7-8-9), the assignments of error being:

> "IN U. S. CIRCUIT COURT OF APPEALS
> ASSIGNMENT OF ERRORS—Filed May 7, 1923.
>
> Now on this the 10th day of April, 1923, comes J. W. Sunderland, appellant in the above entitled cause of action and defendant in the trial court, and alleges and says:
>
> That the decree made and entered and filed in this case on or about the 5th day of March, A. D. 1923, rendering judgment against the appellant and affirming the judgment of the lower Court, to-wit, The United States District Court within and for the Eastern District of the State of Oklahoma, cancelling and annulling the deed executed and delivered on the 20th day of November, 1918, by Nathaniel Perryman and Fannie

Perryman in favor of the defendant, J. W. Sunderland, and also cancelling and annulling the judgment rendered in favor of the defendant, J. W. Sunderland, quieting the title in him in the Superior Court of Tulsa County, Oklahoma, on the 28th day of April, 1919, in Civil Cause No. 5919, which said property is described as follows, to-wit:

> Southeast Quarter of Section 8, Township 16 North, of Range 13 East, containing 160 acres, more or less, in Tulsa County, Oklahoma,

is erroneous and unjust to him, the said J. W. Sunderland, for the following reasons which he states are and assigns as erroneous and unjust and injurious to him in said action and in the decree of the said lower court and in the decree of the said appellate court and in said decrees, to-wit:

First: The decree of the appellate court made and entered as aforesaid on the 5th day of March, 1923, affirming the judgment and decree of the said lower court, to-wit, the United States District Court within and for the Eastern District of the State of Oklahoma, is injurious and unjust and erroneous.

(a) No such questions were involved in the appeal as were decided by said United States Circuit Court of Appeals.

(b) The said United States Circuit Court of Appeals failed to decide the matter and things in controversy involved and inhering in the appeal.

(c) It was never contended in the lower court or in the appellate court that Congress

did not have power and authority to delegate authority to the Secretary of the Interior.

(d) It was never contended in the lower court nor said appellate court that when Oklahoma became a state, Congress had no power nor authority to legislate respecting the Indians within the state.

Second: The appellant alleges and says that there was presented to said Circuit Court of Appeals for its disposition and also which are presented to this Court for its disposition, and which this appellant alleges as grounds of error, the following specifications of error, to-wit:

Third: Because the court erred in overruling the motion of the defendant J. W. Sunderland to dismiss the bill for want of equity, and for the further reason that said bill of complaint and the allegations therein contained do not state sufficient facts to constitute a cause of action in favor of the plaintiff and against the defendant J. W. Sunderland.

Fourth: Because the court erred in rendering a judgment cancelling the deed hereinbefore mentioned, made, executed and delivered on the 30th day of November, 1918, by Nathaniel Perryman, and Fannie Perryman, running to and in favor of defendant J. W. Sunderland.

Fifth: Because the court erred in vacating, annulling, setting aside and for naught holding the judgment rendered by the Superior Court of Tulsa County, Oklahoma, on April 28th, 1919, wherein the said Superior Court did on said day render judgment in favor of

the defendant, J. W. Sunderland, quieting the title in the above described premises in the said J. W. Sunderland.

Sixth: Because the court erred in rendering judgment quieting the title in and to the Southeast Quarter of Section 8, Township 16 North, of Range 13 East, containing 160 acres, more or less, in Tulsa County, Oklahoma, in Nathaniel Perryman.

Seventh: Because the Court erred as a matter of law in holding that the Secretary of the Interior is clothed with the authority to impose restrictions upon unrestricted real estate within the boundary of the State of Oklahoma, upon which no restrictions existed at the time of the attempted imposition of restrictions against alienation by the Secretary of the Interior; and in holding that the Act of Congress approved May 27th, 1908, conferred upon the Secretary of the Interior the right to impose restrictions against alienation, a part of which Act reads as follows:

'• • • All homesteads of said allottees enrolled as mixed-blood Indians having one-half or more than one-half Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or any other encumbrance prior to April 26th, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposition of proceeds for the benefit of the respective Indians as he may prescribe.'

Eighth: The court erred in holding as a matter of law and evidence that the Secretary of the Interior did impose restrictions against

Nathaniel Perryman at the time the above described premises was purchased from Grant R. McCullough, et al., for the reason the evidence in the case fails wholly and utterly to prove that the Secretary of the Interior did impose restrictions against alienation upon said premises, the evidence in that regard being merely a telegram which was introduced as plaintiff's exhibit No. 17, and which reads as follows:

'Western Union, July 2, 1918..
Parker, Superintendent, Muskogee, Oklahoma.

Referring your telegram and letter June 27th and 28th respectively, authority granted you to invest on behalf of Nathaniel Perryman, Nine Thousand Six Hundred Dollars in purchase property therein described using a restricted form of deed.

(Signed) C. P. Hauk, Acting Asst Commission.

Land F. T. 52766-18, 55315,18 VWR, CPH. JWH. M.'

Ninth: Because the court erred in holding as a matter of law, that the Act of Congress of May 27th, 1908, or any other Act of Congress, ever conferred upon the Secretary of the Interior of the United States of America, the right and authority to impose restrictions upon the lands purchased with released funds, because, forsooth the Act provides:

'That from and after sixty days from the date of this Act, the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes,' etc.

The Act itself limiting restrictions against alienation upon lands, as to lands that had

prior thereto and after the act been allotted.

Tenth. The court erred in holding that the Secretary of the Interior has the power or authority to provide in a deed to lands purchased with restricted funds—

"• • • Subject to the conditions that no lease or mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the lifetime of said grantee, at any time prior to April 26, 1921, shall be of no force or effect, or capable of confirmation or ratification, unless made with the consent of, and approved by the Secretary of the Interior' had such authority at the time it was alleged that the above described property was purchased from Nathaniel Perryman.

Eleventh: The court erred in finding as a matter of law and evidence, that the sale of the above described lands to J. W. Sunderland, by the said Nathaniel Perryman and Fannie Perryman, was not made with the consent or approval of the Secretary of the Interior, for, as a matter of fact, the evidence introduced by the government failed utterly to show that the Secretary of the Interior never gave his approval of the sale of said lands by the said Nathaniel Perryman and Fannie Perryman to J. W. Sunderland.

• • • • • • •

Twelfth: The Court erred as a matter of law in rendering judgment finding that the Secretary of the Interior of the United States of America has the authority to impose restrictions on otherwise unrestricted

lands so as to interfere with the free trade and commerce between the people of this state and of the several states without the consent of the Secretary of the Interior, because forsooth the exercise of such power is contrary to and in violation of Section 3 of Article 4 of the Constitution of the United States, in that it denies the admission of Oklahoma into the Union on an equal footing with other states, in that it denies free trade and commerce between the citizens of this state and of the several states with the citizens of this state.

Fourteenth: The authority of the Secretary of the Interior exercising the right to impose restrictions upon otherwise unrestricted land is illegal and void and contravenes Section 1 of Article 1 of the Constitution of the United States, in that it attempts to confer upon the Secretary of the Interior the right and authority to legislate upon the subject and thereby formulate, create and promulgate a set of rules whereby he is authorized to impose restrictions in violation of said Section 1 which confers upon the Congress of the United States itself the authority to legislate and define by appropriate legislation the power and authority of the various agencies of the government.

Fifteenth: The decree violates the spirit of the Constitution of the United States as enunciated in its preamble.

* * * * * * *

Seventeenth: The decree of the District Court of the Eastern District of Oklahoma violates the 10th Amendment to the Constitution of the United States, in that there

is no authority conferred in the constitution whereby the United States can interfere with the state in the enactment of laws concerning conveyances of real estate. And further, if the Secretary of the Interior has the authority to impose restrictions, the same would be against the right of taxation, and the state would not have the authority to levy and collect taxes on real estate where a restriction is thus imposed within the State of Oklahoma; and the right to levy and collect taxes on real estate within the state, not the property of the United States, but that of a citizen of the state, and so long as such levy and collection of taxes is on real estate within the state, not the property of the United States, but that of a citizen of the state, and so long as such levy and collection of taxes conforms to due process of law and equal protection of the law, is a state right, which the Congress cannot abrogate.

Eighteenth: The decree violates Section 3 of Article 4 of the Constitution of the United States in that it holds in effect a denial of the right of the State of Oklahoma to tax her own real estate, and a denial of this right is an admission of Oklahoma, into the United States on an unequal footing with the other states forming the Union; and further, that it denies to the State of Oklahoma, the right and authority to legislate respecting trade and commerce in real estate among the people of the State of Oklahoma and the people of other states and, therefore, is not the admission of Oklahoma on an unequal footing with the other states of the Union.

Nineteenth: The decree violates Section 4 of Article 4 of the Constitution of the United

States in that it gives the United States authority to destroy all forms of government within the state, as the state cannot exist without its right to levy and collect taxes on its real estate, and this decree indirectly denies to the state the right to levy and collect taxes upon real estate wherein restrictions are imposed by the Act of the Secretary of the Interior upon otherwise unrestricted and taxable lands.

Twentieth: The decree violates the 5th Amendment of the Constitution of the United States in that it takes the property out of the legislative control of the state and places the same within the control of the United States without due process of law.

* * * * * * *

Twenty-second: The court erred in not rendering judgment in favor of the defendant, J. W. Sunderland, upon the evidence introduced by both the United States and the defendant, J. W. Sunderland.

Wherefore, the defendant prays that the decree of the lower court rendering judgment cancelling the deed hereinbefore mentioned and also the judgment of the Superior Court of Tulsa County, Oklahoma, hereinbefore mentioned, and in vacating the said decree and setting the same aside, and holding the same for naught, be reserved, and for the costs of this appeal and for all other proper relief, and also the decree of the Circuit Court of Appeals affirming said judgment.

J. M. Springer, & Elbridge G. Wilson,
Attorneys for Appellant."

(File endorsement omitted.) (Record, 104 to 109.)

Brief and Argument

For convenience the appellant will group the propositions relied upon for a reversal into three subdivisions:

First: The Congress of the United States is without power or authority to authorize the Secretary of the Interior to impose restrictions on released lands that have passed to private ownership and subject to the taxing power of the state and the judgments, decrees and orders of the state courts and that are the subject of trade and commerce.

Second: Conceding that Congress has authority to authorize the Secretary of the Interior to impose restrictions on unrestricted lands that have become subject to the taxing power of the state and subject to the judgments, decrees and orders of the Courts of the State and are the subject of trade and commerce among the people of the state in which the land is located, yet, nevertheless, as respects the subject matter of this action, Congress never exercised such power either by general or special legislation, nor has it conferred such authority upon the Secretary of the Interior, by legislative grant of power, the Act of May 27, 1908, conferring, as has been supposed, no such power.

Third: The evidence in this case is wholly insufficient to support the judgment and conclusion of the trial court, there being no competent, relevant or material evidence introduced to support such judgment.

The two first propositions suggested are sufficiently raised by the motion to dismiss the bill hereinbefore referred to, and also by objecting to the introduction of testimony, and also by the exception to the decree and judgment of the court.

The land in controversy was unrestricted at the time of the purchase from Grant R. McCullough and others, and had been for a number of years prior thereto. The land had become subject to the laws of the State of Oklahoma affecting real estate including its power to bond the state and subject to the judgments, decrees and orders of the courts of the State of Oklahoma and was exolusively within the control of the laws of the state, unrestricted and unhampered by any federal control or restrictions of any kind or character. The record fully discloses this state of facts. In view of this state of the record, we assert that the court erred in overruling the motion to dismiss and in rendering pudgment in favor of the appellee for the reason that the order and judgment of the Court is in violation of Section 8 of Article 1 of the Constitution of the United States, which declares the subjects concerning which Congress shall have power to legislate. A considera-

tion of this section of the Constitution leads inevitably to the conclusion that this government is one of certain, definite, specific and enumerated powers.

The government can claim no powers which are not granted to it by the Constitution and the powers actually granted must be such as are expressly enumerated, or which necessarily arise by implication. In *Martin* v. *Hunter,* 1st *Wheat* 304, 326, 4th L. Ed. 97, 102, this Court said:

> "The government of the United States is one of delegated, limited and enumerated powers." *U. S.* v. *Harris,* 106 U. S. 629.

Turning then to the powers enumerated by Section 8 of Article 1 of the Constitution of the United States, we find nothing therein which authorizes or confers upon Congress the power to legislate respecting the property of a state, or property belonging to citizens not of Indian extraction within a state. Nor can it be implied from any of the powers expressely granted that Congress is given authority to legislate respecting unrestricted property within a state owned by citizens not of Indian extraction within the prohibited degrees. The last paragraph of the section which authorized Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, is not the

delegation of a new and independent power, but is simply a provision for making effective the powers already granted by the Constitution itself; (4 *Wheat* 421), and there being no general grant of legislative power, it has become an accepted constitutional interpretation that this is a government of enumerated and limited powers. *McCullough* v. *Maryland,* 4 Wheat 405, 4 L. Ed. 601. There being nothing in the enumerated powers contained in Section 8 of Araicle 1, conferring upon the Congress the authority to legislate respecting the property of a state or of white citizens within a state, we must look to other provisions in the constitution to see if they contain such provisions.

Section 3 of Article 4 provides:

> 'That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States or of any particular state."

This provision of the Constitution has been somewhat dealt with in the case of *State of Kansas* v. *Colorado,* 51 L. Ed. 956, where this Court, speaking through Justice Brewer in construing this provision, made use of this language:

> 'The full scope of this paragraph has never been fully settled. Primarily, at least, it is a grant of power to the United States of control of its property. This is implied by the

words 'territory or other property.' It is true it has been referred to in some decisions as granting political and legisltive control over the territory as distinguished from the States of the Union.

Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto, but clearly, *it does not grant to Congress any legislative control over the state and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.''*

The exercise of the legislative authority over the individual state or the property of the people within the state, is purely a state right over which Congress has no power to take action or legislate It is enough for the purpose of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams, and other waters.

—*Martin* v. *Waddell*, 16 Pet. 367, 10 L. Ed. 997;

—*Pollard* v. *Hagan*, 3rd How. 212, 11 L. Ed. 565;

—*Pollard* v. *Kibbe*, 9 How. 471, 13 L. Ed. 220;

—*Barney* v .*Keokuk*, 94 U. S. 324, 24 L. Ed. 224;

—*St. Louis* v. *Myers*, 113 U. S. 566, 28 L. Ed. 1131;

—*Packer* v. *Bird*, 137 U. S. 661, 34 L. Ed. 819;

—*Hardin* v. *Jordan*, 140 U. S. 371, 35 L. Ed. 428;

—*Kaukana Water Power Co.* v. *Green Bay N. M. Canal Co.*, 142 U. S. 254, 35 L. Ed. 1004;

—*Shivley* v. *Bowlby*, 152 U. S. 1, 38 L. Ed. 331;

—*St. Anthony Falls Water Power Company* v. *St. Paul Water Commissioners*, 168 U. S. 349, 42 L. Ed. 497;

—*Kean* v. *Calumet Canal Improvement Company*, 190 U. S. 452, 47 L. Ed. 1134.

An examination of these authorities is convincing that Congress is powerless under the Constitution to legislate respecting the property of a state, and this leads us to a consideration of what is meant by a State. Personal property belongs to the individual and can be removed from the state, but real estate belongs primarily to, and within certain territorial boundaries constitutes, the State.

—*Van Brocklin* v. *Anderson*, 117 U. S. 167;

—*Pollard* v. *Hagan*, 3 How. 212.

A state is a political subdivision of the United States and consists of the territory within certain bounds and the people that reside in it, and is, so far as the powers of Congress un-

der the constitution are concerned, a separate and distinct sovereignty; and Congress is without power to legislate concerning the real estate within the boundaries of a state, not the property of the United States.

And all existing laws in so far as such law is intended to authorize the Secretary of the Interior to take from the State of Oklahoma the right to levy and collect taxes upon real estate within its borders, of the right to take from trade and commerce among the people of the state any particular tract of land, the Indian title to which has been extinguished, the same not being the property of the United States, was not made in pursuance of the Constitution of the United States for the government can claim no powers which are not granted to it by the Constitution and the powers actually granted must be such as are expressly given or given by necessary implication. Therefore, if the Act in question can be held to confer upon the Secretary of the Interior the right to impose restrictions upon unrestricted lands, the same is absolutely illegal and void and of no force or effect whatever, as being an invasion of the rights of the state.

—*Martin* v. *Hunter's Lessee*, 1 *Wheat* 326; Federalist (Hamilton's Essays No. 78);

—*U. S.* v. *Harris*, 106 U. S. 636.

In connection with a discussion of this subject

there remains yet another question to be dealt with.

It must be kept in view that the appellant contends that the Act of May 27, 1908, confers no authority whatever, upon the Secretary of the Interior to impose restrictions on unrestricted lands. Nevertheless, the Circuit Court of Appeals in *U. S.* v. *Law,* 250 Fed. 218, has in effect held that the Secretary of the Interior has such authority. however, we defer a consideration of that question for the present.

Turning again to the powers of Congress, it is our contention that, conceding for the present for the purpose of argument, that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions upon lands from which all restrictions had previously been removed, and the lands passed to the control of the state and into the channels of trade and commerce among the people of the state, then such act is in violation of the 10th Amendment to the Constitution of the United States, which is:

> 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively or to the people."

It must be borne in mind that the first ten amendments to the Constitution of the United States were intended to be a limitation upon the

powers of Congress to interfere with State's rights, and it would seem that the present case furnishes a very good illustration of the reason why the tenth amendment in particular was adopted, because a construction of the constitution is made absolutely certain by this amendment. After enumerating what powers concerning which Congress may legislate, the framers of the Constitution were determined that no interpretation should be placed upon it of such a nature that, while certain enumerated powers were granted, but for the benefit of the whole, legislative powers affecting the Nation belong to Congress, although not expressed in the grant of the powers, and so as to cut off such a judicial interpretation of the grant of powers, the tenth amendment was adopted.

The Constitution starts out by saying, "we, the people", showing conclusively that the power was at all times reserved in the hands of the people, and the tenth amendment was not intended to be a distribution of power but was intended as a reservation of powers in the states or "in the people as a whole." To now say that Congress has power to hamper with restrictions free trade and commerce within a state by imposing restrictions upon unrestricted lands, lands that had become subject to the taxing power of the state; lands that had become subject to the bonded indebtedness of the state, lands that had become subject to the judgments, decrees and orders of the

Courts of the State, would be to nullify the effect of the 10th amendment. In discussing the very question under consideration here, this Court in *Kansas* v. *Colorado, supra,* makes use of this very pertinent language:

> "As to those lands within the limits of the states, at least the Western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be faund mainly, if not only, in the Western and newer states, *yet the powers of the National Government within the limits of those states are the same—no greater or no less—than those within the limits of the original thirteen* and it would be strange, if, in the absence of a definite grant of power, the Nationel Government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within its borders."

We are thus brought to the consideration of another question. It is the contention of the appellant that, conceding for the present that the Act of May 27, 1908, confers upon the Secretary of the Interior the authority to impose restrictions upon unrestricted lands, the same is in violation of Section 3 or Article 4 of the Constitution which declared: "New states may be admitted by Congress into this Union, etc.", because this

Court in the case of *Coyle* v. *Smith,* 221 U. S. 559, holds that new states may be admitted by Congress into the Union, but that they come in on an equal footing with the original states.

—*Pollard's Lessee* v. *Hagan,* 3 How. 212;

—*Case* v. *Toftus,* 39 Fed. 730.

Summing up our first contention, we assert that if, by any judicial interpretation it can be held that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions against alienation upon unrestricted lands, that the same is illegal and void because the same is contrary to and in violation of Section 8 of Article 1 of the Constitution of the United States, and Section 3 or Article 4 of the Constitution of the United States because, as we have seen, this is a government of definite, specific enumerated and limited powers, and these provisions of the Constitution enumerate what powers Congress may exercise and what property, concerning which Congress may legislate, and no sanction for such legislation can be found in any of these provisions. We contend further that the conferring of such powers is in direct violation of the 10th amendment to the Constitution, which gives to the State of Oklahoma the exclusive right to legislate concerning the lands within its borders, not the property of the United States, and it is our contention that the authorities to which reference is above made fully sustain our contention.

We turn now to a consideration of the second point raised by these proceedings. Notwithstanding the Eighth Circuit Court of Appeals has held in the Law case, *supra,* that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions upon lands where such lands have been purchased with restricted funds, we assert that the Act confers no such authority, and that the Law case has no support in either the Act, reason or logic, and we contend further that the law case is in direct conflict with *McCurdy, County Treas. of Osage County, Okla.,* v. *The U. S.,* 246 U. S. 263, and also the case of the *United States* v. *P. W. Gray,* 284 Fed. 103, and also the case of *United States* v. *J. P. Ranson,* 284 Fed. 108.

It must be kept in view that the allegations of the bill in substance are: That Nathaniel Perryman is a half-blood Creek Indian, that there was allotted to him certain lands; that the lands thus allotted became and were his homestead; that by and with the consent, permission and authority of the Secretary of the Interior, restrictions against alienation were removed and that a part of his homestead was sold, to-wit, ten acres; that the proceeds thus derived from the sale of the lands were invested in the lands in controversy in this law suit, which were unrestricted lands.

It must be borne in mind that the answer filed in this case denies that the homestead of Nathaniel

Perryman was sold, but alleges that the homestead allotted to him he still owns and did at the time of the institution of this case, and that it was worth, at that time, approximately $30,000.00. It must be borne in mind also that the record in this case fully discloses that the land in controversy was and had been for a long time prior to the conveyance by Grant R. McCullough, et al., to Nathaniel Perryman, released from all restrictions, and was subject to the taxing power of the state, the bonded indebtedness of the state, the judgments, orders and decrees of the courts of the state, and was the subject of trade and commerce among the people of this and other states.

The bill of complaint, which was held good as against the motion to dismiss, and the judgment of the trial court, are predicated upon the assumption that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions on land under the circumstances disclosed by the record in this case.

That part of the Act of May 27, 1908, necessary to a proper understanding of the question involved here, reads as follows:

> "The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore."

The Act further provides:

> "That from and after sixty days from the

date of this Act, the status of the *lands allotted heretofore or hereafter to allottees of the Five Civilzed Tribes* shall be as regards restrictions or alienations or any incumbrances, as follows: All lands, including homesteads, of said allottees enrolled as inter-married whites, as freedmen and as mixed blood Indians having less than half Indian blood, including minors, shall be free from restrictions. Of lands, excepting homesteads of said allottees, enrolled as mixed blood Indians having half or more than half and less than three-fourths Indian blood shall be frii from all restrictions. All homesteads of said allottees enrolled as mixed blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or other incumbrance prior to April 26, 1931, except that the Secretary of Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

As reflecting the intention of Congress, the language of the Act becomes significant to a proper understanding of the question under consideration here. The language of the Act is:

> *"The lands allotted hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions or alienation or any incumbrances, etc."*

It is thus seen that the restrictions were limited as to lands HERETOFORE or HEREAFTER *allotted*. There is nothing in the Act anywhere which provides that lands purchased with restricted funds shall be hampered with the imposition of restrictions by the Secretary of the Interior or any one else. It has reference only to the allotted lands. Since it is apparent by the very language of the Act it was not the intention of Congress that restrictions should be imposed upon anything except allotted lands, it becomes necessary for us to observe the provision of the Act by virtue of which the Secretary of the Interior assumes the power to impose restrictions. It reads:

> "Except that the Secretary of the Interior may remove such restrictions wholly or in part under such RULES AND REGULATIONS CONCERNING THE TERMS OF SALE AND DISPOSAL OF PROCEEDS FOR THE BENEFIT OF THE RESPECTIVE INDIAN AS HE MAY PRESCRIBE."

There is nothing in this language which can be construed as conferring upon the Secretary of the Interior the authority to impose restrictions upon lands purchased. It merely gives him the right to dispose of the proceeds for the benefit of the Indian, and when he has done that his authority over the property is at an end. His authority extends no farther than the disposal of the proceeds. In the McCurdy case, *supra*, this Court had before it the consideration of the statute relating to the

Osage tribe of Indians, the language of which is almost identical with the language of Act of May 27, 1908. A part of Section 4 of the Act of April 18, 1912, provides:

> "That the Secretary of the Interior, in his discretion, hereby is authorized, under the rules and regulations prescribed by him, and upon application therefor, to pay to Osage allottees, etc."

It is thus seen that the language of the Act under consideration by this Court in the McCurdy case is identical with the language of the Act under consideration here in so far as it attempts to confer authority upon the Secretary of the Interior to impose restrictions upon alienation of property purchased with released funds. The Osage Indian Act was attacked as being obnoxious to Section 3 of Article 4 and Amendments 9 and 10 of and to the Constitution of the United States, but the opinion does not turn on this question, the Court expressly refusing to decide the case upon that question, using this language:

> "The jurisdiction of this Court was questioned, *but the case is properly here. The constitutional question is substantial,* was properly raised below and was passed upon there. We have, however, no occasion to refer to it, since all questions involved in the case are before us. * * * And there are other grounds upon which the decree must be reversed."

The Court says:

> "There is nothing in the Act or in the facts to which it applies that indicate the purpose to extend control to property in which released funds may be invested."

After quoting the regulations prescribed by the Secretary of the Interior to the effect that the money is to be expended under the supervision of the Secretary of the Interior, it is said:

> *"Like the Act under which they are framed, these regulations contemplate supervision of the expenditures of money, not control of the property, if any, for which the money is expended. They tend to confirm the contention of the appellant that if the money is paid out of the bank, it and the property in which it may be invested are to be free from restrictions.* • • • • While an Indian is still a ward of the Nation, there is power in Congress even to reimpose restrictions on property already freed; *Brader* v. *James*, decided this day, but Congress did not confer on the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from taxation."

The Circuit Court of Appeals, Eighth Circuit, in the Gray and Ransom cases, *supra*, if we understand the holding of the Court, has in effect overruled the Law case, because in the Gray case, after quoting a part of the Act of May 27, 1908, "Except that the Secretary of the Interior may remove such regulations concerning terms of sale

and disposal of proceeds for the benefit of the respective Indians as he may prescribe," the Court makes use of the following language:

> "Conceding that he is to be given authority to dispose of the proceeds for the benefit of the Indian to invest them in real estate, there is no suggestion or intimation of a legislative intention in that clause or section or act or elsewhere, so far as we are advised, that the real estate so purchased shall become exempt. The subject of exemption was in mind when the clause relied upon was under consideration. The section of which it is a part dealt with the disposal of lands that were exempt, and if it was believed that the Secretary was given power to reinvest those funds in other lands, *it is to be assumed that they also would have been declared to be exempt or inalienable if that was intended.* Where the right to claim exemption is rested on legislative purpose to grant it, Mr. Cooley says: 'The intention to exempt must in any case be expressed in clear and unambiguous terms.' Cooley on Taxation, 146."

Later on in the opinion the Court quotes with approval the language of Justice Brandeis in the McCurdy case, *supra,* with this statement: "We think the following remarks in the opinion in that case applicable to this."

While the McCurday, Gray and Ransom cases arose over the power of the state to impose taxes upon property that had been purchased with released funds, the same principle was involved as

in the instant case. Let us pursue this question further.

If the Secretary of the Interior is clothed with the authority to impose restrictions from voluntary sale he is vested with authority to impose restrictions from involuntary sale. A hypothetical case is, if the lands in controversy are subject to taxation under the laws of Oklahoma, and under these decisions it undoubtedly is, then the state has the power to collect the tax. Assuming that the taxes have been levied by the state and are not paid, necessarily a sale must follow for delinquent taxes, and thus divest the grantee of all right in the property. If there is nothing in the Act which prevents an involuntary sale for taxes imposed, then we submit there is nothing in the act which prevents a voluntary sale, because the effect in either case is to divest the grantee of title in the lands. As supporting our contention in this regard we also refer the Court to the case of *United States Fidelity & Guarantee Co.* v. *Hansen, et al.,* by the Supreme Court of the State of Oklahoma, reported in 129 Pac. 60. *Frances* v.. *Frances,* 203 U. S. 233, 238, 51 L. Ed. 165, was an action involving the validity of a restriction against alienation in a patent issued by the President of the United States, the Court said:

> "An inalienable title in fee simple passed by the treaty of September 24, 1819, between the Chippewa Indians to the Children of Bokowtonden, and the patent issued in 1827 required

> the reservation of 640 acres of land contained in said treaty, only located or made definite by boundaries of the tract reserved to them by said treaty. It follows that the words in the patent of 1827: 'But never to be conveyed by them or their heirs without the consent and permission of the President of the United States,' were ineffectual as restrictions upon the powers of alienation. The president had no authority in virtue of his office to impose any such restrictions; certainly not, without the authority of an Act of Congress, and no such Act was ever passed."

The contention that we make here is that the restriction against alienation being one running with the land and not against the Indian personally (*Bowling, et al.* v. *U. S.*, 58 L. Ed. 1080; *Rigley, et al.* v. *McCoy, et al.*, 175 Pac. 259) and the Act itself containing no provision against alienation, the Secretary of the Interior is powerless to embody in a deed a provision against alienation, and if he does so, such provision is illegal and void.

Turning again to the Law case, in all deference to this Honorable Court, we desire to repeat that it is not supported either by the Act of May 27, 1908, reason or logic. The opinion is predicated upon two false assumptions. The opinion assumes that Congress has the power under the Constitution of the United States to invade the rights of the State of Oklahoma and legislate respecting private lands within the state; and,

Second: The opinion assumes that Congress enacted the necessary legislation to authorize the Secretary of the Interior to do precisely the thing the Secretary of the Interior did. At the very threshold of the opinion the Court relies upon the case of *Tiger* v. *Western Investment Company*, 221 U. S. 286, 55 L. Ed. 738, which holds:

> "Congress has had at all times and now the right to pass legislation in the interest of the Indians as a dependent people. * * * That it was within the power of Congress to continue to restrict alienation by requiring as to full-blood Indians the consent of the Secretary of the Interior to a proposed alienation of lands, such as are involved in this case. That it rests with Congress to determine when its guardianship shall cease and while it still continues and has the right to vary its restrictions upon alienation of the Indian lands in the proportion of what it deems the best interest of the Indian."

There was no question involved in the Law case as that decided in the Tiger case, but the quotation above taken from the Law case is cited in support of the opinion of the Court in that case. No one questions the authority of the government under its treaties with the Indians to impose restrictions upon alienation to allotted lands, so long as they remain wards of the government, and yet that was one of the questions before the Court in the Tiger case, which is relied upon to support the holding in the Law case. No question

involved in the Law case involved the power of Congress to legislate respecting the lands of Indians. The only question presented by that case was a construction of the Act of May 27, 1908, involving the power of the Secretary of the Interior under that Act to impose restriction upon alienation. Another case relied upon by that Court in support of its opinion in the Law case is *United States* v. *Gray*, 201 Fed. 291, 119 C. C. A. 529. That case involved the power of the Government to legislate respecting the Indians under Section 8, Subdivision 3 of Article 1 of the Constitution of the United States, when no such question was presented by the Law case nor is any such question presented by this case.

And without taking up each decision, because it would prolong this brief to unreasonable lengths, cited in support of the opinion in the Law case, we desire to make this assertion. That every opinion cited in support of the Law case goes merely to the policy of the government in dealing with the Indians and with the power of Congress to legislate respecting the property of Indians. We desire to repeat here, because we feel that we cannot give too much emphasis to it, that none of these questions were involved in the Law case for a decision of the Circuit Court. On the contrary, the propositions presented by this case and also the Law case, are:

That Congress has no power to legislate respect-

ing unrestricted and privately owned lands within the territorial limits of the State of Oklahoma; neither did Congress attempt to do so by the Act of May 27, 1908. The only power given the Secretary of the Interior by that Act is to release retrictions against alienation in certain cases and "disposal of the proceeds" derived from the sale of restricted lands. It gives him no authority and no power to reinvest the proceeds in other lands but only power in disposing of the proceeds, and to read into the Act a provision that the Secretary of the Interior has a right to impose restrictions against alienation on lands purchased with released funds is to read something into the act that is not there, and that no fair judicial interpretation can consistently place there.

In *Brader* v. *James,* 246 U. S. 88, this Court holds:

That while an Indian is still a ward of the nation there is power in Congress to reimpose restrictions on property already freed. This opinion has, perhaps, been less understood than any other opinion on the subject, because the trial courts have fallen into the error of making no distinction in the question really involved in that case and one like the instant case. The Act itself starts out by saying: "The status of lands heretofore and hereafter allotted, etc", and refers specifically *to allotted lands.* In the Brader case the lands were originally allotted and the lands were still

in the name of the original allottee when Congress reimposed restrictions. In the Brader case Congress took action and reimposed restrictions, although we seriously doubt the power of Congress to do so under the constitutional provision herein discussed. But, as pointed out in the McCurdy case, there is a decided difference with a substantial distinction, "but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation." Had it been in the mind of Congress to clothe the Secretary of the Interior with power to impose restrictions against alienation it would have closed the door to all doubt by saying so.

It follows as a necessary conclusion that if the real property involved was unrestricted property at the time of its conveyance to Nathaniel Perryman, the State Courts had jurisdiction and the United States Court had and has no jurisdiction and that the judgment and decree of the Superior Court of Tulsa County, State of Oklahoma, is valid and binding upon the parties. A copy of said judgment and decree will be found at page 12 of the record. Before this judgment was rendered the United States by James S. Watson, U. S. Probate Attorney, appeared in his offiicial capacity as attorney for said defendants and procured an order withdrawing from the files the separate answer of

Nathaniel Perryman and procuring an allowance of thirty days from the date to further plead, and thereby the United States conceded the jurisdiction of the State Court over the subject matter and the parties. (See Exhibit "E" on page 20 of the transcript of the record.)

As reflecting the intention of Congress, there remains yet another section of the Act of May 27, 1908, to be considered. Section 5 of the Act provides:

> "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void."

It is plain to be seen, by a consideration of the whole Act, that it was intended to be the policy of the government, in so far as possible, to cast the Indian upon his own resources.

First: By conferring authority upon the Secretary of the Interior to release restrictions against alienation; and

Second: By granting unto the Secretary of the Interior the authority to dispose of the proceeds of the restricted lands for the benefit of the In-

dian and when the investment is once made, all the authority of the Secretary of the Interior immediately ceases.

From the language of Section 5, *supra*, it is very evident that such was the intention of Congress because that section specifically provided

> "• • • that any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the *land allotted to allottees of the Five Civilized Tribes prior to the removal of restrictions therefrom* • • • • shall be absolutely null and void."

Had it been the intention of Congress to restrict the property against alienation purchased by the Secretary of the Interior with funds derived from the sale of released lands, it would have said so.

All the way through the Act, restrictions are limited to *allotted lands*, and nowhere in the Act, even by implication, does it appear that Congress intended even remotely to impress upon lands purchased with released funds, the imposition against alienation.

The enabling act for the admission of Oklahoma as a state, is a contract between the United States and the State of Oklahoma (*Coyle* v. *Smith*, 221 U. S. 559) Chapter 3335, U. S. Stat. 1909-1906, Part 1, page 267, Section 3, Paragraph 3, strictly provides:

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned and held by any Indian Tribe or Nation; and that until the title to such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States. That land belonging to citizens of the United States residing without the limits of said state shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its uses."

It is thus seen that by the Enabling Act itself the power of the United States is extended no farther than to lands held by an Indian, Tribe or Nation, and the property belonging to the United States. This one provision is sufficient to settle this question in favor of the appellant.

It must be borne in mind that the lands in dispute here were neither Indian lands nor lands of the United States and had not been such for a number of years prior to the purchase of the same from Grant R. McCullough and Clara E. McCullough, his wife, and Lawrence K. Cone and Kate P. Cone, his wife, which purchase was made on the 24th day of June, 1918. The lands had long prior

to that time been released from all restrictions and had become and were the subject of barter and sale and trade and commerce among the people of this state. The Enabling Act itself provides:

> "* * * *and that until the title to such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States."

The lands involved in this controversy having long since passed from the jurisdiction and control of the United States, it was not within the power of Congress, as we have seen by the constitutional provisions herein cited, to reimpose restrictions on released lands and no such attempt is made by Congress, either in the Act of May 27, 1908, nor the Enabling Act.

To us it is a legal absurdity to say that the lands in controversy, over which the United States had no jurisdiction or control whatever, either directly or remotely, so long as the title to same remained in Nathaniel Perryman's grantors, that the Secretary of the Interior could by purchasing take them entirely without state control, jurisdiction or authority by imposing a restriction against alienation. Congress is without authority to enact such a law, neither has it attempted to do so. Let us suppose that a cloud rested upon the title of the lands in controversy at the time of the sale to Nathaniel Perryman. So long as that title

was reposed in his grantors the Courts of the United States were not open to them to remove the cloud because they were not Indian lands nor property of the United States. Such a question is one purely of state control.

Another question to be considered is that presented by the clause in the deed preventing alienation without the consent of the Secretary of the Interior. It may be urged that the provision constitutes a contract between the grantor and the grantee. This suggestion has no appropriate place in this case for the reason that admitting without conceding that such is the case, the government of the United States is not the proper party to raise such a question. That question can be raised only and solely by the grantors themselves, and that was litigated in the State Court by the judgment set aside in this law suit.

We make this further pertinent suggestion that under the circumstances of the purchase from the grantors to Nathaniel Perryman, that so far as he was concerned, the latter was neither consulted nor in any way advised within regard to the purchase of this land. The transcript shows that permission was asked of the Secretary of the Interior to invest the amount of the purchase price in this identical land. His answer was to "use the restricted form of deed" so in that connection we suggest that there is no contract between the grantors and grantee. Such a transaction does not

rise to the dignity of a contract. But, however, treating the restriction against alienation as a contract between the grantor and the grantee, the Courts, with almost unbroken unanimity, hold that such a provision in a grant of this character, *is absolutely null and void.*

The theory upon which the holding of the Courts is predicated is that the grant of a fee simple title is repugnant to a provision against alienation.

—*Latimer* v. *Wedell,* 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N.S.) 668, and note;

—*Bennett* v. *Chapin,* 77 Mich. 538, 43rd N. W. 893;

—*Kessner* v. *Phillips,* 189 Mo. 515, 88 S. W. 66.

Or in other words, one is opposed to the other, and can not co-exist in the same instrument of conveyance.

Some of the early text writers laid down the proposition that a reasonable restraint against alienation under certain cases would be upheld, but these holdings have been to a large extent based on a misconception of certain early English cases, and on principle and authority the better rule is that a direct restriction for any time, however short, is absolutely void.

In those cases where a restriction against alienation is upheld, an examination of the authorities

will disclose that the ultimate party to be benefited by the restriction was not the immediate grantee but some third party to whom the estimate should go after certain limitations.

These authorities are all accumulated and discussed in the note to *Elizabeth Latimer* v. *Alfred M. Wadell*, 3rd L. R. A. (N.S.) 668, *supra*.

The right to traffic in real estate is as ancient as the law itself, and forms no inconsiderable amount of our commercial transactions, and the control of such transactions is exclusively a state question, and under the constitution the Federal government is powerless to hamper such transactions with the imposition of restrictions, or to authorize its executive or ministerial officers to do so.

Turning now to a consideration of the opinion by the Circuit Court of Appeals (Rec. pp. 98, 99, 100, 101), in justice to ourselves we feel impelled to say that we have felt that an injustice was done the attorneys for the appellant by the position assumed by that Court.

We quote:

> "Counsel attack the constitutionality of this provision of the Act on three grounds:
>
> 1. That it is a delegation of legislation to the excutive department, which is not permissable.
>
> 2. That as these Indians are no longer resid-

ing in a territory of the United States, but in a state of the Union, Congress is without power to legislate for the protection of their property, but they must look to the state alone for it.

3. That the National Government can only deal with Indians by treaty and not by Act of Congress."

We assert that none of these questions were urged in either the oral argument or brief, and we assert, also, that we filed the same brief in that Court that we have filed here, except a few minor changes. Therefore, it is very evident that the real questions involved in this appeal were never decided by the Circuit Court of Appeals, because the opinion of the Court is cast upon a false assumption as to the real questions involved.

As we view the law, none of the authorities cited by that Court in support of its opinion have any bearing on the questions we have urged in this brief, except *United States* v. *Law,* 250 Fed. 218, 162 C. C. A. 354. The opinion by the Circuit Court of Appeals is predicated exclusively upon the policy of the Federal Givernment in dealing with property belonging to the Indians. As no such question is involved in this appeal, we deem it a useless waste of time to consider that phase of the question and will content ourselves by referring briefly to some of the authorities cited by the Court in support of its opinion.

United States v. *Thurston County*, 143 Fed. 287, 74 C. C. A. 425, was an action involving the power of Thurston county to collect taxes from certain lands of the Omaha Winnebago tribes who resided in that county, on account of the proceeds of the sale of the inherited lands deposited by the Secretary of the Interior, then in a bank. The lands sold under the authority of the Secretary of the Interior were restricted, the same being allotted lands. The instant case would furnish an illustration of the rule announced by the Court in the Thurston County case, had the proceeds from the sale of a portion of Nathaniel Perryman's homestead allotment been in some way attacked while they remained in the hands of the Secretary of the Interior.

As we view the opinion it can be of little or no benefit to the Court in deciding the questions presented by this appeal.

National Bank of Commerce v. *Anderson*, 147 Fed. 87, involved this question:

That where lands were allotted to an Indian Citizen under the allotment act of 1877, restraining alienation for 25 years, the act of 1902 did not vacate the trust over such lands held by the United States. We cannot see that this opinion has any bearing whatever on any question involved in this appeal.

U. S. v. *Yakima County, et al.*, 274 Fed. 115,

involved the allotment act of February 8, 1887, which in part provides:

> "Patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for a period of twenty-five years, in trust for the sole use and benefit of the Indian to whom said allotment shall have been made or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or incumbrance whatsoever; Provided, that the President of the United States may in any case in his discretion extend the period, and if any conveyance shall be made of the land set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Section 1 of the Act of May 29, 1908 (35 Stat. 444) (Comp. St. 4224), provides:

> "That when any Indian who has heretofore received or who may hereafter receive an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple for said lands; but if he finds them incapable of managing their own affairs, the land may be sold

as hereinbefore provided; *Provided, that the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs*: And provided further, that upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold."

It is seen by these provisions that the lands allotted should be restricted for a period of twenty-five years for the sole use and benefit of the Indian to whom the allotment should be made; and also provided further that if the lands were sold that the *proceeds derived from such sale should be used during the restricted period for the benefit of the allottee or heir,* which goes much farther than the Act of May 27, 1908, relating to the Five Civilized Tribes. Each of these cases is hypothecated upon some act of Congress with reference to some tribe of Indians, and each of these opinions are squarely against the holding by the Eighth Circuit Court of Appeals in *U. S.* v. *Gray,* 284 Fed. 103, and *U. S.* v. *Ranson,* 284 Fed. 108, where it was expressly held that the State of Oklahoma had the authority to levy and collect taxes against lands purchased with released funds, the instrument of conveyance containing a clause against alienation. The Law case, *supra,* is not a case definitely in point, there being this distinction between that case and the instant case: In

the Law case the Indian was a full blood Cherokee and under the law was incapable of executing an instrument of conveyance of any kind, either to her allotment or surplus land. In the instant case Nathaniel Perryman is a one-half blood Creek Indian and is capable of executing an instrument of conveyance to all of his surplus lands. Concluding this argument, we are forced to the conclusion that the lands in dispute here, when purchased with released funds, became merely the surplus lands of Nathaniel Perryman, and there was no law at the time of the execution of the deed against alienation of such lands.

THIRD PROPOSITION

The decree and judgment of the Court are not supported by sufficient evidence. The appellee before being entitled to a judgment was required to prove, first, that the real estate involved was subject to the Jurisdiction of the United States District Court; Second, that if the Secretary of the Interior had authority under the law to impose restrictions upon unrestricted land after it had passed from the Nation and allottee, then and in that event it became encumbant upon the appellee to prove some general or special order or authority by which he attempted to impose restrictions upon this particular land and that this general or special order or authority was of record in some office giving constructive notice that such

order or authority was in existance.

We submit that no competent evidence whatever was introduced by the appellee to sustain either proposition. In an effort to prove the authority of the Secretary of the Interior, the appellee first introduced in evidence over the objections of the appellant, his Exhibit "2" record Page 61, purporting to be a latter from the First Assistant Secretary of the Interior, dated September 29, 1910, authorizing the Superintendant of the Five Civilized Tribes to disburse from the proceeds of sale allotted lands not to exceed the sum of $250, and that any residue, after such disbursement, should be deposited in the usual manner, subject to the further orders of the department, and further providing that if the total of the item authorized above exceeds the amount received from the sale, this authority must be modified before any disbursements are made, except the cash payment to the allottee. This instrument is a mere letter from the Assistant Secretary of the Interior and had no place in any public record affecting this land and does not purport to authorize the investment of the proceeds of the sale in real estate, nor does it purport to authorize the imposition of restrictions upon any real estate purchased with the proceeds of such sale. We therefore submit that the said letter was irrelevant, immaterial and did not tend to prove any issue in this case,

and that no proper foundation was laid for its introduction and the Court below erred in overruling the appellant's objection to the introduction of said letter in evidence.

The appellee next offered in evidence the order of the Secretary of the Interior removing restrictions from a portion of the homestead of Nathaniel Perryman, but there is nothing in this order authorizing the purchase of unrestricted land nor the imposition of restrictions thereon.

The appellee next offered in evidence its Exhibit 4, Record Page64, purporting to be a letter from the Acting Superintendant of the Five Civilized Tribes, to the Commissioner of Indian Affairs. This letter was not only incompetent, irrelevant and immaterial, but no proper foundation was laid for its introduction, as it contains no evidence or authority of the Secretary of the Interior to purchase unrestricted lands, nor to impose restrictions thereon.

Appellee next introduced in evidence over the objection of the appellant, a purported copy of a telegram signed by Hauke, acting Assistant Commissioner, purporting to authorize the Superintendent of the Five Civilized Tribes to invest on behalf of the defendant, Perryman, $9600 in the purchase of property therein described, using restricted form of deed. No proper foundation was laid for the introduction of this instrument in evidence,

as there was no evidence showing the authority of the Acting Assistant Commissioner to purchase real estate, and if the Secretary of the Interior attempted to authorize the Acting Assistant Commissioner to do so, his act was void under the authorities heretofore cited. This instrument is not recorded in the records of any office and was not constructive notice to the appellant or the public.

In a further effort to prove the authority of the Secretary of the Interior to impose restrictions upon unrestricted land, the appellee offered in evidence over the objections of the appellant, (record, page 68) a letter or instrument purporting to have been written by Samuel Adams, First Assistant Secretary to Dana H. Kelsey, Superintendent Union Agency, relative to the conveyance of certain lands in Johnson County, Oklahoma, by Selina Latcher, nee Underwood, a full-blood Chickasaw Indian, and does not in any manner involve the trasaction in the case at bar, and does not purport to confer upon the Secretary of the Interior or the Superintendant of the Union Agency any authority to invest the proceeds of the sale of Nathaniel Perryman's homestead in unrestricted real estate, nor to impose restrictions upon such unrestricted real estate.

The Appellee next introduced in evidence a warranty deed in blank not purporting to have been executed by any person, to the introduction of which

instrument in evidence the appellant objected for the reason that the same was incompetent, irrelevant and immaterial and that no proper foundation was laid for its introduction. Said instrument will be found at Record, pages, 70 and 71.

The appellee next introduced in evidence, over the objection and exception of the appellant, a letter purporting to have been written by Samuel Adams, First Assistant Secretary to Dana H. Kelsey, Supt. Union Agency. This letter relates exclusively to Indians of the Five Civilized Tribes who should receive funds due them in *lieu* of allottments and has no reference whatever to Indians to whom allottments had been made, nor to the disposition of funds derived from the sale of allotted lands, and was wholly incompetent, irrelevant and immaterial to any issue in the case at bar. The certificate attached to this instrument does not purport to be signed by any person, but the line for signature is blank and thereunder is printed "United States Indian Superintendant."

The appellee next introduced in evidence over the objection of the appellant a letter purporting to have been written by Joe H. Stran, Acting Superintendant of the Five Civilized Tribes to the Commissioner of Indian Affairs. This letter has no place upon the public records of any offiice and does not purport to prove any authority from the Secretary of the Interior, authorizing the imposi-

tion of restrictions upon unrestricted land. Several other instruments were offered in evidence but not one of them tend to prove that the Secretary of the Interior had made any general or special order authorizing the imposition of restrictions upon unrestricted lands. For instance, plaintiff's exhibit 9, page 67, purports to be a telegram received from Hauke, Acting Assistant Commissioner to Parker, Superintendant, purporting to authorize the investment on behalf of Nathaniel Perryman. $9600, in purchase of property described therein, using restricted form of deed. There is no evidence that the Secretary of the Interior authorized the Acting Assistant Commissioner to require the use of the restricted form of deed, and no evidence that the Secretary of the Interior had ever attempted to delegate the authority, if any he had, to impose restrictions upon unrestricted land.

Appellee's exhibit 10 is a certificate that the annexed photographic copies of checks No. 8681, and 9146 are true copies of the original checks on file in the Department, copies of checks following.

Appellee's Exhibit No. 11 is a deed from Grant R. McCullough et al., to Nathaniel Perryman, conveying the lands in controversy.

Appellee's Exhibit No. 12 purports to be a deed from Nathaniel Perryman to Fannie Perryman conveying the lands involved.

Appellee's Exhibit No. 13 purports to be a re-

ceipt from Eldon Lowe of a certain check signed by L. K. Cone and Grant R. McCullough.

Exhibit 14 purports to be a certificate signed by E. B. Merritt that the papers attached there are true copies.

Appellee's Exhibit 15 purports to be a confirmation of copy of office telegram sent by C. P. Hauke, Acting Assistant Commissioner to Parker, Superintendent, purporting to grant authority to the Superintendent to invest on behalf of Nathaniel Perryman, $9600 in purchase of property therein described, using restricted form of deed.

Appellee's Exhibit 16 is certificate that the foregoing telegram is a true copy of the original.

To the introduction of all of these instruments in evidence the appellant objected for the reason that they were incompetent, irrelevant and immaterial and that no proper foundation had been laid for their introduction.

We therefore submit, in conclusion, that:

First: Congress is without power or authority to legislate so as to hamper with the imposition of restrictions the free trade and commerce of the lands within a state upon which there exists no restrictions against alienation and which have become subject to the taxing power of the state, and the judgments, orders and decrees of the Courts of the State that might be rendered against the owner of such real estate, and

in favor of his creditors, and further, so as to hamper or interfere with the free trade and commerce of such real estate among the people of the State, and of the several states.

Second: That if Congress has such power, then the Act of May 27, 1908, confers no such power or authority upon the Secretary of the Interior; and,

Third: That the evidence in this case wholly fails to estbalish a cause of action in favor of the appellee nad against the appellant for the reason that none of the evidence introduced as exhibits was properly admitted in evidence for the reason that the exhibits were not properly identified. That no proper foundation had been laid for their reception in evidence; that there was never introduced in evidence any general or special rules or orders promulgated by the Secretary of the Interior showing that he exercised in this particular case, or for that matter in any other case, the power conferred upon him by congress to impose restrictions upon unrestricted land purchased with released funds.

For these reasons we most respectfully submit that the case should be reversed and that the judgment should be rendered in favor of the appellant.

J. M. Springer,
W. H. Thompson,
E. G. Wilson,
Attorneys for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1924

J. W. SUNDERLAND, APPELLANT
v.
THE UNITED STATES OF AMERICA } No. 79

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

By section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress, legislating with respect to lands allotted to members of the Five Civilized Tribes, declared:

> All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

Invoking the exercise of the power granted by this provision, Nathaniel Perryman, a Creek half-blood, applied to the Secretary of the Interior for the removal of restrictions upon a portion of his homestead allotment. This application was granted, the Secretary's order providing "such removal of restrictions to become effective only and simultaneously with the execution of deed by said allottee to the purchaser after said land has been sold in compliance with the directions of the Secretary of the Interior." (Ex. 3, R. 63.) Pursuant thereto, the land was sold and the proceeds retained by the Secretary of the Interior to be disbursed for the benefit of the allottee.

Subsequently, upon application of Perryman (Ex. 18, R. 85, 86) and upon recommendation of the Superintendent of the Five Civilized Tribes (Ex. 8, R. 73), the Secretary of the Interior authorized the purchase, out of a portion of these proceeds, of the tract of land involved in this suit, upon condition that a form of deed, called the Carney-Lacher form, should be used (Ex. 15, R. 81). That form of deed contained the following clause:

> Subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force or effect or capable of confirmation or ratification unless made with the consent of and approved by the Secretary of the Interior.

The purchase was made, and a deed containing that clause was executed June 24, 1918, by the owners to Perryman. The deed recited a consideration of $9,600, "the same being funds held by the United States in trust, subject to disbursement under the supervision of the Secretary of the Interior derived from the sale of restricted land." (Ex. 11, R. 76, 77.) The purchase money was paid by check issued to Perryman by the cashier of the Five Civilized Tribes. (Ex. 10, R. 75.)

Disregarding the prohibition in the deed against alienation or incumbrance without approval by the Secretary of the Interior, Perryman executed four instruments affecting this land. Two of these were rental contracts to appellant Sunderland, each covering a portion of the land. (Exs. B and C, R. 6, 8.) The other two were deeds, one of November 30, 1918, conveying for a consideration of $5,000 the entire tract to Sunderland. (Ex. D, R. 9.) The other was a deed dated February 20, 1919, to Perryman's wife, covering a part of the land. (Bill, Par. VI, R. 3.)

To set aside these instruments as null and void and to clear the title of Perryman to this land, the Government brought suit in the United States District Court for the eastern district of Oklahoma. By amendment the bill also sought to set aside a certain judgment, secured by Sunderland in a suit brought in the Superior Court of Tulsa County, Oklahoma, by which title to this land was quieted in him. (Ex. F, R. 11, 12.)

In defense, Sunderland relied upon his State Court judgment and challenged the power of the Secretary of the Interior to control the disposition of the purchased land and the right of Congress to enact legislation giving such power to the Secretary.

The District Court upon a hearing entered a decree cancelling the deeds but upholding the validity of the rental agreements (R. 22–25). The decree was affirmed by the Circuit Court of Appeals (R. 103, Op. R. 98–103), 287 Fed. 468.

The record on appeal to this Court presents only the question of the validity of the deed to Sunderland and the effect of the State Court judgment. However, appellant in his brief abandons the question respecting the State Court judgment. Clearly he could not do otherwise in view of the decisions of this Court, particularly *Bowling* v. *United States*, 233 U. S. 528; *Privett* v. *United States*, 256 U. S. 201.

PROPOSITIONS

I. The Secretary of the Interior was authorized to impose restrictions upon alienation of the land purchased with trust funds.

II. The legislation granting such power is constitutional.

III. There was no error in the admission of evidence.

I.

The Secretary of the Interior was authorized to impose restrictions upon alienation of the land purchased with trust funds.

The prime purpose of the act of May 27, 1908, *supra*, was to make subject to the taxing power of the

State of Oklahoma, lands allotted to certain classes of members of the Five Civilized Tribes who were represented to Congress as competent to manage their property without supervision.

The standard of competency adopted by Congress was the quantum of Indian blood. Thus, all lands of mixed bloods of less than half Indian blood were freed entirely of restrictions; those of half blood and less than three-quarter blood were freed as to all lands, *except homesteads;* and all lands of those of more Indian blood were continued under restriction.

The clear implication is that Congress was not entirely convinced that half-bloods were capable of unsupervised management of their property, and while it was willing to "take a chance" on their capacity, yet it cast an anchor to windward by preserving the homestead. Thus it insured that even if the result of the emancipation of the half-blood with respect to his other lands proved disastrous, he still would not be entirely destitute.

But to provide for cases where the restriction upon alienation might work to the detriment of the Indians and the removal of the restriction might be to his best interest, Congress enacted that part of section 1 with which we are here particularly concerned. We quote it again:

> that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

It is important to note that even in this provision Congress proceeded with much caution. The removal of restrictions was to be "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he [the Secretary] may prescribe." This language leaves no doubt of the intent of Congress to give the Secretary broad discretion in the exercise of the power conferred. It is he to whom is intrusted the determination of what is for the benefit of the Indian. The "benefit of the respective Indians" are the words of the statute, showing that the case of each Indian was to be separately considered. This emphasized the idea of broad discretion, for each Indian's situation presented an individual problem.

It is significant that Congress appeared to have considered that removal of restrictions would only occur when a sale of the land was contemplated, and the inference is that the Secretary would exercise his power only where a sale of the restricted property was deemed advantageous to the Indian and more beneficial to him than its retention would be.

Noteworthy also is the fact that not only were the rules and regulations of the Secretary to govern the *sale* of the property but also the *disposal of the proceeds*. Congress considered one just as important as the other—indeed, there is reason to believe that the disposal of the proceeds was more important, for it would be of little avail to protect the Indian from imposition and an improvident

bargain in the sale of his restricted land, and then to release to him the proceeds. At least the need of protection and supervision in the one was just as great as in the other.

This need of supervision and restraint in the disposal of the proceeds is abundantly demonstrated by the transactions in the instant case. The price paid for the land deeded to Perryman was $9,600. A little more than five months later, appellant Sunderland secured a deed from Perryman for a consideration of $5,000. Moreover it was stipulated at the trial, which was early in 1921, that the land was worth $10,000.

The particular regulation under which the Secretary acted in this case is—

> 20. In any case where lands are purchased for the use and benefit of any citizen of the Five Civilized Tribes of the restricted class, payment for which is made from proceeds arising from the sale of restricted allotted land, or other moneys held under the control of the Department of the Interior, the Superintendent for the Five Civilized Tribes shall cause conveyance of such lands to be made on form of conveyance containing an habendum clause against alienation or encumbrance until April 26, 1931, as follows:
>
> TO HAVE AND TO HOLD said described premises, unto the said grantee, ------ heirs and assigns forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature, subject

> to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, UNLESS MADE WITH THE CONSENT OF AND APPROVED BY THE SECRETARY OF THE INTERIOR.

Now the test of the validity of the regulations is their reasonableness, appropriateness, and their consistency with the law by which they were authorized. *United States* v. *Morehead*, 243 U. S. 607; *La Motte* v. *United States*, 254 U. S. 570.

We assert that the regulation passes that test for, considered in the light of the evident purpose of Congress, it is not unreasonable, it is not inconsistent with the law, and it certainly is appropriate to carry out the intent of Congress for the protection of the Indian. But even if there were doubt about it, the doubt should be resolved in favor of the validity of the regulation, for it is clear that it is beneficial to the Indian; witness the instant case. *United States* v. *Celestine*, 215 U. S. 278, 290.

The appellant apparently conceives the power of the Secretary, so far as the proceeds of the sale are concerned, as limited to approving or vetoing a proposed investment of them without condition. If that were correct it is difficult to see the need of rules and regulations governing the disposal of the

proceeds. So limited an authority would not make them necessary.

We submit that that is too narrow a definition of the extent of the authority granted. The rule is that such powers are to be broadly construed to accomplish the purpose of Congress. Instances of the application of this rule of construction are *Parker* v. *Richard*, 250 U. S. 235, and *La Motte* v. *United States*, 254 U. S. 570.

Parker v. *Richard* involved a lease of restricted land of a Creek Indian. Section 2 of the Act of May 27, 1908, authorized leases of such land to be made "with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." The regulations required payment of royalties to the Secretary's representative and authorized the representative to withhold payment in whole or in part for such time as may be in accord with the best interests of the lessor or his heirs. These were held proper and valid—yet the language of the statute was not nearly so broad as in the instant case.

La Motte v. *United States* raised the question of the power of the Secretary under a statute authorizing leases of lands of Osages which prescribed that such leases should be "subject only to the approval of the Secretary of the Interior." It was held that the Secretary was not limited to a mere approval or disapproval of a lease as presented, but that he had power to promulgate regulations prescribing how the

lease should be executed and what conditions and terms should be incorporated therein. The court said (pp. 575, 576):

> It is insistently urged that the regulations adopted and promulgated by the Secretary of the Interior are void and of no effect, and therefore that no right to relief can be predicated upon the defendant's disregard of them. The argument advanced is that the leasing provision says nothing about regulations; that the clause "subject *only* to the approval of the Secretary of the Interior" makes strongly against any regulations; that what is intended is to leave the Indian free to lease in his own way and on his own terms, subject to the Secretary's approval or disapproval of the lease after it is given; and that the regulations, as adopted and promulgated, unwarrantably interfere with this freedom of action. In our opinion the insistence is not tenable. * * *
>
> The leases are subjected to the Secretary's approval or disapproval to the end that the allottees and their heirs may be protected from their own improvidence and from over reaching by others. Both the lands and the Indians are remote from the seat of government, and without some general and authoritative rules for the guidance of intending lessors and lessees it is certain that improvident and ill-advised leases would be given and multiplied in a way which would confuse and embarrass the Indians and greatly enhance the difficulties attending the Secretary's supervision.

And at page 577.

> Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval.

There is a further consideration:

The continuing, by section 1 of the Act of May 27, 1908, of restrictions on the homesteads of Indians in the same class as Perryman was in furtherance of the policy of protecting and safeguarding the Indians. When Perryman's homestead allotment was sold that policy obtained as to the proceeds which were substituted for the homestead. The same obligation which the Government had assumed with respect to the homestead it assumed with respect to the proceeds. There was merely a change in the form of that to which the duty extended. The proceeds were trust funds. Being such, the investment of them in other property impressed it with the same trust. *United States* v. *Thurston County*, 143 Fed. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87.

While the language of the Act is that "the Secretary of the Interior may remove *restrictions*," yet it really amounts to an authority to the Secretary to sanction a sale of the restricted land.

Other legislation with respect to sales of lands and disposal of the proceeds evidences the policy of Congress to consider the proceeds as trust funds and to authorize supervision of and control over them. The Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1018, provided that any incompetent Indian might sell restricted land allotted to him, or as to which he had an inherited interest, "on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir * * * under the supervision of the Commissioner of Indian Affairs."

The Act of May 29, 1908, c. 216, 35 Stat. 444, sec. 1, contained like language as to the sale of lands "which can be sold under existing law by authority of the Secretary of the Interior" and the disposal of the proceeds.

So also the Act of June 25, 1910, c. 431, 36 Stat. 855, sec. 1, which prescribed that where an allottee died before expiration of the trust period without disposing of the allotment by will the Secretary, if he decided that any of the heirs were incompetent, might "cause such lands to be sold." The provision respecting the proceeds is (p. 856):

> That the proceeds * * * shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent.

Construing these provisions of the Acts of March 1, 1907, and June 25, 1910, the Supreme Court of Washington held in *Rider* v. *La Clair*, 77 Wash. 488, that an Indian could not mortgage personal property purchased with the proceeds of the sale of the allotment of an incompetent Indian. It was said (pp. 491, 492):

> We adopt the words of the trial judge: "I think that upon the sale of an allotment of an incompetent Indian, in pursuance of section 1, Act of Congress of June 30th [25], 1910, . . . or the Act, 34 Stat. L. 1018, . . . the purchase price received by the United States has the same legal status as the allotment itself had and therefore is not subject to alienation by the Indian, and that property purchased (like that in question) by the United States for the Indian with said purchase price, the title being taken in the United States, also has the legal status of the allotment and is not subject to alienation. In other words, the purchase price of such an allotment when sold by the United States, or its proceeds when the United States uses such purchase price to purchase other property for the Indian, taking title in the name of the United States, does not become subject to alienation by the Indian. The United States taking the title in its own name in trust for the Indian is as an express and unequivocal manifestation of its intention not to relinquish the trust—not turn the property over to the Indian to do with as he may please—and it seems to

> me that it rests exclusively with the United States as trustee and as guardian of the Indian to determine when, if at all, it will relinquish the trust and turn over the property to the Indian to do therewith as he may choose."

We do not think the fact that the title to the property purchased with the proceeds was taken in the name of the United States necessarily controlled the decision. It merely was considered a clear indication of the purpose to control and not relinquish the land to the Indian. Nor is there any distinction in principle between personal and real property so purchased.

The Circuit Court of Appeals has now three times passed upon the precise question raised in this case. In addition to the case at bar it upheld the power of the Secretary and the validity of this restriction in the deed in *United States* v. *Law*, 250 Fed. 218, and *United States* v. *Smith*, 288 Fed. 356.

In *United States* v. *Law* the Circuit Court of Appeals supported its decision by an opinion in which the question was discussed at length and the authorities collected and analyzed. In view of this we think it unnecessary to examine and consider in this brief the same authorities.

Appellant contends that the decisions in *United States* v. *Gray*, 284 Fed. 103 (dismissed for want of jurisdiction, 263 U. S. 689), and *United States* v. *Ransom*, 284 Fed. 108 (affirmed per curiam, 263 U. S. 691), have in effect overruled *United States* v.

Law. But, as pointed out by the Circuit Court of Appeals, those cases involved the question of whether lands purchased with restricted or trust funds were subject to state taxation—a very different question from that of the power of the United States to control its Indian wards in the disposition of such lands.

The same is true of *McCurdy* v. *United States*, 246 U. S. 263, also relied upon by appellant. Moreover the statute involved in that case authorized the Secretary of the Interior to pay to any Osage allottee, under rules and regulations to be prescribed by him, all or part of the funds held for his benefit, provided the Secretary was satisfied of the competency of the allottee or that the release of the individual trust funds would be to the best interest and welfare of the allottee. A sum of money so held was released to an allottee and applied in payment for a tract of land.

It will be observed that the authority given by this statute was not as broad as the Act involved in the instant case. The authority was to "pay" or "release" the funds or a part of them.

This court said (p. 272):

> Furthermore, in the case at bar it is not shown that the money released from the trust was invested directly in property restricted as to alienation. Apparently Panther's money had been released six months before the deed to him was executed and was used to pay for a conveyance of the land to Brenner, as trustee for Robert and Emma Panther. What the terms of the trust were,

does not appear. But there is nothing in the record to indicate that a restriction upon the alienation of the land was among them or that the Secretary of the Interior expressly reserved control over the property or its proceeds. It may well be that the Commissioner of Indian Affairs then believed that an ordinary trust of the property for a short period would best advance the interests of Panther. It is consistent with the facts shown that the restriction upon alienation inserted in the deed was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. In this respect and others the present case differs from *United States* v. *Thurston County*, 143 Fed. Rep. 287, much relied upon by the Government.

The same Court of Appeals that decided *United States* v. *Gray* and *United States* v. *Ransom* also decided *United States* v. *Law* and *United States* v. *Smith*, and found no conflict or inconsistency in the decisions, although its attention was called to them in this case.

II

The legislation granting such power is constitutional

A great part of appellant's brief is devoted to an argument that the Act of May 27, 1908, as construed below, is unconstitutional.

We do not think it necessary or profitable to answer that argument in detail. The appellant's claims on this point meet the obstacle of the many decisions

of this Court declaring that the power of Congress with respect to the Indians is plenary. Congress has had at all times the right to pass legislation in the interests of the Indians as a dependent people; citizenship is not incompatible with this guardianship. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

This power can not be limited or impaired by state legislation. *Blanset* v. *Cardin*, 256 U. S. 319; *Bunch* v. *Cole*, 263 U. S. 250; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488.

Such legislation does not conflict with the Oklahoma Enabling Act of June 16, 1906 (c. 3335, 34 Stat. 267), *Sperry Oil & Gas Co.* v. *Chisholm*, *supra*.

III

There was no error in the admission of evidence

It is difficult to determine the basis for the contention of the appellant that there was not sufficient or competent evidence to support the decree of the District Court. The brief speaks of a failure to prove the authority of the Secretary to impose restrictions upon the purchased land. But the question of whether the Secretary had such authority is a legal one and would depend on a construction of the Act of Congress.

We do not propose to discuss the various items of proof to which appellant refers. Suffice it to call the Court's attention briefly to the fact that in answering the Government's bill defendant admitted, (a) that a *portion* of the homestead allotment of Perry-

man was sold (Ans. par. 1, R. 14); (b) the execution to Perryman of the deed covering the land; and (c) the execution of the deed of Perryman and wife to him (Ans. par. 2, R. 15).

Further appellant testified that before he purchased the land he examined the county records and found the deed to Perryman containing the prohibition against alienation and the endorsement of the Superintendent of the Five Civilized Tribes certifying that the purchase price was derived from the sale of his homestead allotment (R. 59).

Now, nearly all the exhibits introduced by the government showing the transactions affecting the sale of the homestead, the purchase of the land, and the other matters incident thereto set forth in our statement of the case, were copies of documents on file in the office of the Superintendent of the Five Civilized Tribes or in the Bureau of Indian Affairs. These were certified to by the Superintendent of the Five Civilized Tribes and by the Assistant Commissioner of Indian Affairs, respectively. They were properly admitted in evidence. The Act of April 26, 1906, c. 1876, 34 Stat. 137, provides in section 8 that the officer having charge of any of the records pertaining to the enrollment of the members of the Five Civilized Tribes and the disposition of the land and other property of the tribes may make certified copies of such records, *which shall be evidence equally with the originals thereof.* Like authority is given to the Commissioner of

Indian Affairs with respect to records in his office. Act of July 26, 1892, c. 256, 27 Stat. 272.

The Act of August 24, 1912, c. 370, 37 Stat. 497, provides in section 1 that the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department may furnish authenticated copies of any official books, records, papers, documents, etc., within his custody and charge specified fees therefor. Section 3 declares that all authenticated copies furnished under this Act shall be admitted in evidence equally with the originals.

CONCLUSION

The judgment of the Circuit Court of Appeals was right and should be affirmed.

JAMES M. BECK,
Solicitor General.
IRA K. WELLS,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

OCTOBER, 1924.

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SUNDERLAND *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 79. Argued October 16, 1924.—Decided November 17, 1924.

1. The United States is not bound by a decree of a state court, to which it was not a party, quieting title to restricted Indian land against the Indian in favor of his attempted grantee, but may have both the conveyance and the decree set aside by suit in the federal court. P. 232.
2. The fact that land has become subject to jurisdiction of a State and exclusively within the control of her laws does not prevent the United States from restricting for a limited time the right of a tribal Indian to alienate it, when purchased for him with funds derived from the sale of other lands originally subject to a like restriction. Such restriction not conflicting with any statute, rule of law or policy of the State, the question of supremacy of power does not arise. *Id.*
3. The validity of such a restraint on alienation imposed by the United States is not to be tested by the power of an ordinary grantor to impose a like restraint on an ordinary grantee. P. 233.
4. So long as the Indians remain wards of the Government, the interposition of the strong shield of the federal law is justified, to the end that they be not overreached or despoiled in respect of their property of whatsoever kind or nature. P. 234.
5. In view of the general protective policy towards the Indians, statutory authority to the Secretary of the Interior to remove restrictions on allotted lands in the Five Civilized Tribes "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe" (Act of May 27, 1908, § 1, c. 199, 35 Stat. 312), justifies a rule that where lands are purchased for Indians of the restricted class with the proceeds of sale of restricted allotted lands the deed of the lands purchased shall contain a like restriction. *Id.*
6. Also, the authority of the Secretary to withhold his consent to a proposed investment of such proceeds of sale subject to his control, includes the lesser authority to allow the investment upon condition that the property bought shall be impressed with a like control. P. 235.

7. Evidence *held* sufficient to show that restrictions on alienation in a deed to an Indian were directed by the Secretary of the Interior. P. 235.

287 Fed. 468, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court setting aside, at the suit of the United States, a deed made to the appellant by a half-blood Creek Indian, and a decree of an Oklahoma court quieting the title against the Indian in the appellant's favor.

Mr. E. G. Wilson and *Mr. J. M. Springer*, with whom *Mr. W. H. Thompson* was on the brief, for appellant.

Congress cannot authorize the Secretary of the Interior to impose restrictions on released Indian lands that have passed into private ownership and are subject to the taxing power of the State and the jurisdiction of her courts and to the freedom of trade and commerce.

The Tenth Amendment gives to the State the exclusive right to legislate concerning the lands within her borders, not the property of the United States. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *United States* v. *Harris*, 106 U. S. 629; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Kansas* v. *Colorado*, 206 U. S. 46, 89, 92; *Martin* v. *Waddell*, 16 Pet. 367; *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471; *Barney* v. *Keokuk*, 94 U. S. 324; *St. Louis* v. *Myers*, 113 U. S. 566; *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371; *Kaukauna Water Co.* v. *Green Bay Co.*, 142 U. S. 254; *Shively* v. *Bowlby*, 152 U. S. 1; *St. Anthony Falls Co.* v. *Water Commissioners*, 168 U. S. 349; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; Federalist (Hamilton's Essays No. 78); *Coyle* v. *Smith*, 221 U. S. 559; *Case* v. *Toftus*, 39 Fed. 730.

United States v. *Law*, 250 Fed. 218, has no support either in the act, or in reason, and is in direct conflict with *McCurdy* v. *United States*, 246 U. S. 263; *United States*

v. *Gray*, 284 Fed. 103; and *United States* v. *Ransom*, 284 Fed. 108. See also *U. S. Fidelity & Guaranty Co.* v. *Hansen*, 36 Okla. 459; *Francis* v. *Francis*, 203 U. S. 233. Distinguishing, *Tiger* v. *Western Inv. Co.*, 221 U. S. 286; *United States* v. *Gray*, 201 Fed. 291; *United States* v. *Thurston County*, 143 Fed. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87; and *United States* v. *Yakima County*, 274 Fed. 115, relied upon by the court in the *Law Case*.

It was the policy of the act to cast the Indian upon his own resources, so far as possible, first, by conferring authority upon the Secretary to release restrictions against alienation; and second, by granting to the Secretary the authority to dispose of the proceeds of the restricted lands for the benefit of the Indian. When the investment is once made, all authority of the Secretary immediately ceases. See § 5, Act of 1908. Had it been the intention of Congress to restrict against alienation property purchased by the Secretary, it would have said so.

By the Oklahoma Enabling Act, § 3, the power of the United States is extended no farther than to lands held by an Indian tribe, or nation, and the property belonging to the United States.

The evidence in this case is wholly insufficient to support the judgment and conclusion of the trial court.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Wells* were on the brief, for the United States.

The Secretary was authorized to impose restrictions upon alienation of the land purchased with trust funds.

The prime purpose of the Act of May 27, 1908, was to make subject to the taxing power of Oklahoma lands allotted to certain classes of members of the Five Civilized Tribes who were represented to Congress as competent to manage their property without supervision. The stand-

ard of competency adopted by Congress was the quantum of Indian blood. Congress was not entirely convinced that half-bloods were capable of unsupervised management of their property, and while it was willing to "take a chance" on their capacity, yet it cast an anchor to windward by preserving the homestead. But to provide for cases where the restriction upon alienation might work to the detriment of the Indians and the removal of the restriction might be to his best interest, Congress enacted (§ 1) "that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." This language leaves no doubt of the intent of Congress to give the Secretary broad discretion in the exercise of the power conferred. It is he to whom is intrusted the determination of what is for the benefit of the Indian.

It is significant that Congress appeared to have considered that removal of restrictions would only occur when a sale of the land was contemplated, and the inference is that the Secretary would exercise his power only where a sale of the restricted property was deemed advantageous to the Indian and more beneficial to him than its retention would be. Noteworthy also is the fact that not only were the rules and regulations of the Secretary to govern the sale of the property but also the disposal of the proceeds. Congress considered one just as important as the other. The need of supervision and restraint in the disposal of the proceeds is abundantly demonstrated by the transactions in the instant case.

The test of the validity of the regulations is their reasonableness, appropriateness, and their consistency with the law by which they were authorized. *United States* v. *Morehead*, 243 U. S. 607; *LaMotte* v. *United States*, 254 U. S. 570.

The regulation under which the Secretary acted passes that test. But even if there were doubt about it, the doubt should be resolved in favor of the validity of the regulation, for it is clear that it is beneficial to the Indian. *United States* v. *Celestine*, 215 U. S. 278.

The appellant apparently conceives the power of the Secretary, so far as the proceeds of the sale are concerned, as limited to approving or vetoing a proposed investment of them without condition. If that were correct it is difficult to see the need of rules and regulations governing the disposal of the proceeds. So limited an authority would not make them necessary. The rule is that such powers are to be broadly construed to accomplish the purpose of Congress. *Parker* v. *Richard*, 250 U. S. 235; *LaMotte* v. *United States*, 254 U. S. 570.

The continuing, by § 1 of the Act of 1908, of restrictions on the homesteads of Indians in the same class as Perryman, was in furtherance of the policy of protecting and safeguarding the Indians. When Perryman's homestead allotment was sold that policy obtained as to the proceeds which were substituted for the homestead. There was merely a change in the form of that to which the duty extended. The proceeds were trust funds. Being such, the investment of them in other property impressed it with the same trust. *United States* v. *Thurston County*, 143 Fed. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87.

While the language of the act is that "the Secretary of the Interior may remove restrictions," yet it really amounts to an authority to the Secretary to sanction a sale of the resricted land.

Other legislation with respect to sales of lands and disposal of the proceeds evidences the policy of Congress to consider the proceeds as trust funds and to authorize supervision of and control over them. Acts of March 1, 1907, 34 Stat. 1015; May 29, 1908, § 1, 35 Stat. 444; June

25, 1910, § 1, 36 Stat. 855. See *Rider* v. *La Clair*, 77 Wash. 488.

In addition to the case at bar, the Circuit Court of Appeals has upheld the power of the Secretary and the validity of this restriction in the deed in *United States* v. *Law*, 250 Fed. 218, and in *United States* v. *Smith*, 288 Fed. 356.

United States v. *Gray*, 284 Fed. 103 (dismissed for want of jurisdiction, 263 U. S. 689), and *United States* v. *Ransom*, 284 Fed. 108 (affirmed per curiam, 263 U. S. 691), involved the question whether lands purchased with restricted or trust funds were subject to state taxation—a very different question from that of the power of the United States to control its Indian wards in the disposition of such lands. The same is true of *McCurdy* v. *United States*, 246 U. S. 263.

The legislation granting such power is constitutional, *Tiger* v. *Western Inv. Co.*, 221 U. S. 286; *Blanset* v. *Cardin*, 256 U. S. 319; *Bunch* v. *Cole*, 263 U. S. 250; *Sperry Oil Co.* v. *Chisholm*, 264 U. S. 488; and does not conflict with the Oklahoma Enabling Act.

There was no error in the admission of evidence.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Nathaniel Perryman, a Creek half-blood Indian, was allotted a homestead, with restrictions against alienation until April 26, 1931, subject, however, to removal, wholly or in part, by the Secretary of the Interior, "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." § 1, c. 199, 35 Stat. 312. Upon application, the Secretary removed the restrictions from a portion of the homestead, which was then sold, the proceeds of the sale being retained by the Secretary. Subsequently a portion of the proceeds was used to purchase

another tract of land (the subject of the present controversy), such purchase being authorized by the Secretary upon condition that the deed of conveyance contain a clause restricting the alienation of the land so purchased until April 26, 1931, "unless made with the consent of and approved by the Secretary of the Interior." The deed was made accordingly and duly recorded in the records of Tulsa County, Oklahoma. Perryman, thereafter, without the consent of the Secretary, sold and conveyed the land to the appellant. A decree of an Oklahoma state court was obtained in a suit against Perryman, to which the United States was not a party, quieting title in appellant. The United States then brought this suit in the Federal District Court for the Eastern District of Oklahoma to cancel and set aside the conveyance of the land to appellant and annul the decree of the state court. The District Court rendered a decree in favor of the United States, which was affirmed by the Court of Appeals. 287 Fed. 468.

Upon the appeal here, appellant does not seriously challenge the decree in so far as it annuls the decree of the state court (*Bowling* v. *United States*, 233 U. S. 528, 534-535; *Privett* v. *United States*, 256 U. S. 201, 203), but confines his attack to that portion of the decree canceling the deed. The grounds relied upon are: (1) That Congress is without power to authorize the imposition of restrictions upon the sale of lands within a State which have passed to private ownership; (2) That Congress has not, in fact, conferred upon the Secretary such authority; and (3) That there is no competent, relevant or material evidence sufficient to support the decree of the trial court.

First. The power of Congress is challenged upon the ground that the land had become subject to the jurisdiction of the State and was exclusively within the control of its laws. The general rule is not to be doubted, that the tenure, transfer, control and disposition of real prop-

erty are matters which rest exclusively with the State where the property lies, *United States* v. *Fox*, 94 U. S. 315, 320-321; but it by no means follows that a restriction upon alienation, limited as it is here, may not be imposed by the United States as a condition upon which a purchase of private lands within the State will be made for an Indian ward. The question is argued as though there had been an actual invasion of or an interference with the authority of the State to regulate and condition the transfer of land within its boundaries. But there is no such invasion or interference. If Congress, in fulfillment of its duty to protect the Indians, whose welfare is the peculiar concern of the Federal Government, deems it proper to restrict for a limited time the right of the individual Indian to alienate land purchased for him with funds arising from the sale of other lands originally subject to a like restriction, we are not aware of anything which stands in the way. The State of Oklahoma is not concerned, since there is no state statute, rule of law or policy, which has been called to our attention, to the contrary effect. If there were, or if the power of state taxation were involved, we should consider the question of supremacy of power; but no such question is presented by this record.

Nor are we called upon to determine whether a qualified and limited restraint upon the alienation of a fee simple title, imposed by an ordinary grantor upon an ordinary grantee, would be valid, even though not offensive to the rule against perpetuities. However that may be, we do not doubt the power of the United States to impose such a restraint upon the sale of the lands of its Indian wards, whether acquired by private purchase and generally subject to state control or not. Such power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the

peculiar duty of the Federal Government to safeguard their interests and protect them against the greed of others and their own improvidence. See and compare *Libby* v. *Clark*, 118 U. S. 250, 255; *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 473; *Blanset* v. *Cardin*, 256 U. S. 319, 326; *Bunch* v. *Cole*, 263 U. S. 250, 252; *Sperry Oil Co.* v. *Chisholm*, 264 U. S. 488, 493. And the power does not fall short of the need; but, so long as they remain wards of the Government, justifies the interposition of the strong shield of federal law to the end that they be not overreached or despoiled in respect of their property of whatsoever kind or nature. *United States* v. *Kagama*, 118 U. S. 375, 383–4.

Second. The statute imposes the restriction upon the alienation of the Indian's *allotted* lands and this, it is said, precludes an extension of the restraint to lands purchased for him. The authority given the Secretary to remove such restrictions, under prescribed rules and regulations "concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians," it is further insisted, ends with the disposal of the proceeds and does not extend so far as to permit him to impose restrictions upon the alienation of land purchased with such proceeds. The Secretary did not construe the statute so narrowly, but, acting under it, among other rules, prescribed that, "Where lands are purchased for the use and benefit of any citizen of the Five Civilized Tribes, of the restricted class, payment for which is made from proceeds arising from the sale of restricted allotted lands . . . the superintendent . . . shall cause a conveyance of such lands to be made on a form of conveyance containing an habendum clause against alienation or encumbrance until April 26, 1931."

When the general protective policy of Congress in dealing with the Indians is borne in mind, it reasonably can-

not be doubted that the authority conferred upon the Secretary to make rules concerning the "disposal of the proceeds for the benefit of the respective Indians" is broad enough to justify the rule in question. Since the allotted lands could not be sold or encumbered without his consent, and since the proceeds of any sale thereof were subject to his control and could only be disposed of with his approval and under such rules as he might prescribe for the benefit of the respective Indians, the extension of such control to the property in which the proceeds were directly invested would seem to be within the statute fairly construed. Indeed, we think the authority of the Secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control. See *United States* v. *Law*, 250 Fed. 218; *United States* v. *Thurston County*, 143 Fed. 287, 290–291; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87, 90. It is unnecessary to review the decisions said by appellant to justify the contrary conclusion. Upon examination they are all found to be readily differentiated from the case under consideration.

Third. The only suggestion contained in appellant's brief which seriously relates to the sufficiency of the evidence, is that the proof fails to establish that the Secretary imposed restrictions specifically upon the sale of the land in question. There was received in evidence a telegram from the Department, purporting to grant authority to purchase the land for Perryman and directing the use of "a restricted form of deed." We are unable to see how this could have referred to anything else than the requirement of the rule heretofore quoted. It is said further that the telegram was not recorded in any office so as to

give constructive notice to appellant or the public. It was not necessary that it should have been. The conveyance made by its authority, embodying the restriction required by the rule, was recorded, and that was enough. The remainder of appellant's brief under this head resolves itself into a mere challenge of the competency or relevancy of certain documentary evidence, including the telegram just mentioned, admitted, over objection, by the trial court. The assignment of errors contains no suggestion that the erroneous admission of evidence would be relied upon. The rulings of the court, therefore, admitting such evidence are not before us.

Decree affirmed.